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Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Court of International Trade

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This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 82-9)

GENERAL PROVISIONS

Change in the Field Organization of the Customs Service

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This notice amends the Customs Regulations by changing the field organization of the Customs Service to:

—Extend the limits of the Saginaw-Bay City-Flint, Michigan, Customs port of entry (Region IX), to include the Tri-City Airport;

—Extend the limits of the San Francisco-Oakland, California, Customs port of entry (Region VIII), to include Travis Air Force Base;

—Extend the limits of the Durham, North Carolina, Customs port of entry (Region IV), to include the Raleigh-Durham Airport complex; and,

—Clarify the limits of the Columbus, Ohio, Customs port of entry (Region IX).

The changes are part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

EFFECTIVE DATE: Feb. 11, 1982.

FOR FURTHER INFORMATION CONTACT: Richard C. Coleman, Office of Inspection, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to

carriers, importers, and the public, Customs published a notice of proposed rulemaking in the Federal Register on July 10, 1981 (46 FR 35682), proposing to:

—Extend the limits of the Saginaw-Bay City-Flint, Michigan, Customs port of entry (Region IX), to include the Tri-City Airport,

—Extend the limits of the San Francisco-Oakland, California, Customs port of entry (Region VIII), to include Travis Air Force Base;

—Extend the limits of the Durham, North Carolina, Customs port of entry (Region IV), to include the Raleigh-Durham Airport complex; and,

Clarify the limits of the Columbus, Ohio, Customs port of entry (Region IX).

The changes were proposed for the following reasons:

(a) *Saginaw-Bay City-Flint, Michigan.* The limits of the consolidated Customs port of entry of Saginaw-Bay City-Flint, Michigan, which were extended by T.D. 79–74 (44 FR 12029), do not encompass the Tri-City Airport. Because virtually all of the international aircraft arriving in the area, particularly general aviation from Canada, is processed at the recently improved Tri-City Airport, Customs determined that the port limits should be extended to include that facility.

(b) *San Francisco-Oakland, California.* T.D. 79–74 also clarified, but did not change, the geographical description of the port limits of the Customs port of entry of San Francisco-Oakland, California. The Regional Commissioner of Customs, San Francisco (Region VIII), requested that the port limits be extended to include Travis Air Force Base.

Travis Air Force Base, located near San Francisco, California, is outside both city and Customs port of entry limits. However, Customs was providing manpower for service at this location on a regular basis. To ensure continued service for this workload, which was subject to the uncertainty and additional costs associated with out-of-port service, Customs proposed to extend the San Francisco-Oakland port limits to include Travis Air Force Base.

(c) *Durham, North Carolina.* Operations at the Durham, North Carolina, Customs port of entry reflected an increase in the volume of aircraft and over-the-road shipments, accompanied by a decrease in the importation of tobacco for warehousing. Planning was underway to expand the Raleigh-Durham Airport complex to accommodate the increased traffic and larger aircraft. The Raleigh-Durham Airport, which is outside the current port limits, was expected to encompass the major portion of Durham's workload.

Also, Customs was advised that it would have to vacate its present Durham office. Because adequate office space was available at the

Raleigh-Durham Airport, Customs determined that moving its offices to the airport and extending the existing port limits to include the airport would locate manpower closer to major work locations and improve Customs service in the area.

(d) *Columbus, Ohio.* The port limits of the Columbus, Ohio, Customs port of entry coincided with the city's corporate limits. However, because the city annexed surrounding areas on a piecemeal basis over the years, there were areas within the city which were not included in the Customs port of entry. As a result, it often was difficult to determine whether service at various locations was being provided inside or outside port limits.

In order to improve service to the public, Customs proposed to clarify the port boundaries.

Interested parties were given until September 8, 1981, to comment on the proposed changes. No comments were received in response to the notice. Accordingly, Customs has determined to adopt the proposal as set forth in the notice of proposed rulemaking published in the Federal Register on July 10, 1981.

CHANGES IN THE CUSTOMS FIELD ORGANIZATION

Under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (46 FR 9336), the following changes in the Customs field organization are adopted:

(a) The geographical boundaries of the Saginaw-Bay City-Flint, Michigan, Customs port of entry are extended to include:

All the territory within the corporate limits of Saginaw and Bay City; from Bay City due west along the right-of-way of U.S. Highway No. 10, to the intersection of Garfield Road and U.S. Highway No. 10, south on Garfield Road to and including the Tri-City Airport, bounded on the west by Garfield Road, on the east by Hackett Road, on the south by Freeland Road and on the north by Sarle Road, the territory embracing the Townships of Zilwaukee, Carrolton and Buena Vista, in Saginaw County; the Townships of Portsmouth and Frankenlust, in Bay County; the right-of-way of Interstate Highway 75, south to and including Flint Township; the city of Flint; and that portion of Genesee Township bounded by Saginaw Street on the west, Stanley Road on the north, Lewis Road on the east, and the city of Flint on the south; all in the State of Michigan.

(b) The geographical boundaries of the San Francisco-Oakland, California, Customs port of entry are extended to include:

All the territory within the corporate limits of San Francisco and Oakland; all points on the San Francisco Bay, San Pablo Bay, Carquinez Strait, and Suisun Bay; all points on the San Joaquin River in Contra Costa and San Joaquin Counties, to and including Stockton; north along U.S. Interstate 80 to Airbase Parkway, east along Airbase Parkway to and including the territory comprising the Travis Air Force Base; all points on the Sacramento River in Solano, Yolo, and Sacramento Counties, from the junction of the Sacramento River within the San Joaquin River in Sacramento County, to and including Sacramento, California; and all points on the Sacramento River Deep Water Ship Channel in Solano, Yolo, and Sacramento Counties, from and including the junction of Cache Slough with the Sacramento River, to and including Sacramento; all in the State of California.

(c) The geographical boundaries of the Durham, North Carolina, Customs port of entry are extended to include:

All the territory within the corporate limits of Durham; and from the southeast intersection of the corporate limits of Durham and U.S. Highway No. 70, southeast along U.S. Highway No. 70 to State Road 1002 (also named Airport Road), southwest along State Road 1002 to and including the territory comprising the Raleigh-Durham Airport; and beginning at the intersection of the southeastern corporate limits of Durham and Ellis Road, southerly along the west side of Ellis Road a distance of 1.1 miles to Cook Road, then westerly along the north side of Cook Road a distance of .6 mile to Alston Avenue, then northwesterly along the east side of Alston Avenue a distance of 1.2 miles to the corporate limits of Durham; all in the State of North Carolina.

(d) The geographical boundaries of the Columbus, Ohio, Customs port of entry include all of the territory within the corporate limits of Columbus, Ohio; all of the territory completely surrounded by the city of Columbus; and, all of the territory enclosed by Interstate Highway 270 (outer belt), which completely surrounds the city.

EXECUTIVE ORDER 12291

Because this will not result in a "major rule" as defined in section 1(b) of Executive Order 12291, the regulatory impact analysis and review prescribed by section 3 of the Executive Order is not required.

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

Customs routinely establishes, expands, and eliminates Customs ports of entry throughout the United States to accommodate the

volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon some small entities, it is not expected to be significant because extending the port limits at Customs ports of entry in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act.

Accordingly, pursuant to the provisions of section 3 of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*), the Secretary of the Treasury has determined that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, these regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Lawrence P. Dunham, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENTS TO THE REGULATIONS

To reflect these changes, the column headed "Ports of Entry" in the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by:

(a) Substituting "(T.D. 82–9)." for "(T.D. 79–74)." in the listing for "Saginaw-Bay City-Flint" in the Detroit, Michigan, Customs district (Region IX);

(b) Substituting "(T.D. 82–9)." for "(T.D. 79–74), all points on San Francisco Bay, and the territory described in E.O. 10042, March 10, 1949 (14 F.R. 1155), T.D. 53738 and T.D. 56020." in the listing for "SAN FRANCISCO–OAKLAND, CALIF.," in the San Francisco, California, Customs district (Region VIII);

(c) Inserting "and T.D. 82–9." following "9 FR 3761" in the listing for "Durham" in the Wilmington, North Carolina, Customs district (Region IV); and

(d) Inserting "(T.D. 82–9)." following "Columbus, Ohio." in the listing for the Cleveland, Ohio, Customs district (Region IX).

Dated: December 23, 1981.

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, Jan. 12, 1982 (47 F.R. 1286)]

(T.D. 82-10)

Bonds

Approval and Discontinuance of Carrier's Bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: January 7, 1982.
213888

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/port
Adley Corp., 10990 Roe Ave., Shawnee Mission, KS; motor carrier; Federal Ins. Co. D 12/10/81	Oct. 27, 1976	Nov. 22, 1976	Baltimore, MD $50,000
Air Couriers Inc., 9338 Woodson Terrace Industrial Ct., St. Louis, MO; motor carrier; Safeco Ins. Co. of America D 1/4/82	Jan. 1, 1979	Jan. 17, 1979	St. Louis, MO $50,000
Atlas Van Lines, Inc., 1212 St. George Rd., P.O. Box 509, Evansville, IN; motor carrier; Aetna Casualty & Surety Co. (PB 6/15/76) D 12/9/81	Nov. 20, 1981	Dec. 9, 1981	Cleveland, OH $75,000
B & R Trucking Co., 7462 Mission Gorge Rd., San Diego, CA; motor carrier; Old Republic Ins. Co. (PB 1/18/72) D 12/1/81 [1]	Nov. 24, 1981	Dec. 1, 1981	Seattle, WA $25,000
CF Air Freight, Inc.—See Consolidated Freightways Corp. of DE			
CF Arrowhead Services—See Consolidated Freightways Corp. of DE			
Caribmar Trading Ltd., Inc., 3500 NW. 114th St., Miami, FL; motor carrier; The Aetna Casualty & Surety Co.	Oct. 19, 1981	Nov. 30, 1981	Miami, FL $25,000
Chowtaw Transport, Inc., 800 Bay Bridge Rd., P.O. Box 10068, Prichard, AL; motor carrier; Ins. Co. of North America	Nov. 12, 1981	Dec. 7, 1981	Mobile, AL $25,000
Clairmont Transfer Co., Inc., 1803 Seventh Ave., North, P.O. Box 717, Escanaba, MI; motor carrier; Fidelity & Deposit Co. of MD	Dec. 3, 1981	Dec. 28, 1981	Milwaukee, WI $50,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Consolidated Freightways Corp. of DE and its div. CF Air Freight, Inc., Corp. of DE and CF Arrowhead Services, 175 Linfield Dr., Menlo Park, CA; motor carrier; Safeco Ins. Co. of America (PB 4/14/80) D 10/5/81 [2]	Oct. 6, 1981	Dec. 8, 1981	Portland, OR $50,000
C. H. Dredge & Co., Inc., 918 S. 2000 W., Layton, UT; motor carrier; Northwestern National Ins. Co. of Milwaukee, WI	Nov. 1, 1981	Dec. 9, 1981	San Francisco, CA $25,000
Fundis Co., P.O. Box 740, (110 Broadway), Lovelock, NV; motor carrier; American Casualty Co. of Reading, PA	May 29, 1981	Dec. 7, 1981	San Francisco, CA $25,000
General Freights, Inc., Operator of Hagerstown Motor Express Co., Inc., Rt. 11, PA Ave., Hagerstown, MD; motor carrier; St. Paul Fire & Marine Ins. Co. D 12/10/81	Dec. 13, 1978	Feb. 27, 1979	Baltimore, MD $25,000
Great Western Trucking Co., Inc., Highway 103 East, P.O. Box 1384, Lufkin, TX; motor carrier; Lawyers Surety Corp.	Dec. 14, 1981	Dec. 28, 1981	Houston, TX $25,000
Hagerstown Motor Express Co., Inc.—See General Freights, Inc.			
Jonel, Inc., dba: Will-Cin Transportation Co., P.O. Box 2229, Richmond, CA; motor carrier; Fireman's Fund Ins. Co. (PB 5/23/80) D 7/20/81	July 17, 1981	Nov. 10, 1981	San Francisco, CA $25,000
Lake Line Express, Inc., 3020 W. Franklin St., P.O. Box 1021, Appleton, WI; motor carrier; American Ins. Co.	Nov. 24, 1981	Nov. 27, 1981	Milwaukee, WI $25,000
Midwest Continental, Inc., 5200 Highway 75 North, P.O. Box 3289, Sioux City, Iowa; motor carrier; St. Paul Fire & Marine Ins. Co.	Nov. 2, 1981	Dec. 8, 1981	Chicago, IL $25,000
Mullen Trucking Ltd., P.O. Box 9008 Station F, Calgary, Alberta, Canada; motor carrier; Continental Ins. Co.	Nov. 20, 1981	Nov. 25, 1981	Great Falls, MT $100,000
Pacific Freightways Ltd., 8020 Enterprise St., Burnaby, B.C., Canada; motor carrier; Old Republic Ins. Co. (PB 10/3/73) D 12/1/81 [2]	Nov. 25, 1981	Dec. 1, 1981	Seattle, WA $25,000
Ram Rod Trucking, P.O. Box 707, Marrero, LA; contract motor carrier; Aetna Casualty & Surety Co. D 11/25/81	Mar. 24, 1981	Mar. 24, 1981	New Orleans, LA $50,000
Royal Express, Inc., 129 Westview Dr., P.O. Box 632, Bardstown, KY; motor carrier; Continental Ins. Co.	Dec. 9, 1981	Dec. 16, 1981	Cleveland, OH $100,000
Super Cartage Co., Inc., 3250 S. Pulaski Rd., Chicago, Ill.; motor carrier; St. Paul Fire & Marine Ins. Co.	Oct. 22, 1981	Dec. 7, 1981	Chicago, IL $35,000

See footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director, amount
Tobler Transfer, Inc., P.O. Box 339, Peru, Ill.; motor carrier; Reliance Ins. Co. (PB 9/20/69) D 10/1/81 [4]	Sept. 20, 1981	Oct. 1, 1981	Chicago, IL $25,000
Trux Transport, Inc., 341 Allerton Ave., S. San Francisco, CA; motor carrier; Peerless Ins. Co. (PB 10/30/79) D 10/2/81	Aug. 26, 1981	Dec. 4, 1981	San Francisco, CA $25,000
Warnaco Trucking Corp., 350 LaFayette St., Bridgeport, CT; motor carrier; Ins. Co. of North America	Nov. 17, 1981	Nov. 17, 1981	New Orleans, LA $25,000
Will-Cin Transportation Co.—See Jonel, Inc.			
Yeary Transfer Co., Inc., 2171 Christian Rd., P.O. Box 398, Lexington, KY; motor carrier; American Ins. Co. (PB 6/15/76) D 11/20/81 [5]	Oct. 23, 1981	Nov. 20, 1981	Cleveland, OH $75,000

[1] Surety is Peerless Ins. Co.
[2] Principal is Consolidated Freightways Corp. of DE & CF Air Freight, Inc.
[3] Surety is Peerless Ins. Co.
[4] Principal is H. J. Tobler Transfer, Inc.; Surety is Lumbermens Mutual Casualty Co.
[5] Surety is Fireman's Fund Ins. Co.

BON-3-03

MARILYN G. MORRISON
Director,
Carriers, Drawback and Bonds Division.

(T.D. 82-11)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued October 8, 1981, to November 30, 1981, inclusive, pursuant to sections 22.1 through 22.5, inclusive, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded and the date on which it was forwarded.

Dated: January 7, 1982.

File: DRA-1-09, 213892.

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Advanced Micro Computers, Inc.
Articles: Computer circuit boards, subassemblies, computers and computer peripheral equipment.
Merchandise: Semiconductor devices; cooling fans; power supplies.
Factories: Santa Clara and Sunnyvale, CA; Austin, TX.
Statement signed: July 21, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, November 5, 1981.

(B) Company: Advanced Micro Devices, Inc.
Articles: Fully fabricated semiconductor wafers.
Merchandise: Raw silicon wafers.
Factories: Sunnyvale, CA (2); Austin, TX.
Statement signed: July 21, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, November 5, 1981.

(C) Company: Advanced Micro Devices, Inc.
Articles: Finished semiconductor devices.
Merchandise: Semiconductor devices.
Factories: Sunnyvale, CA (2); Austin, TX.
Statement signed: July 21, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, November 5, 1981.

(D) Company: Ball Metal Container Group.
Articles: Metal containers, various sizes; aluminum alloy can ends; touch and go (pull or press) ends of aluminum alloy.
Merchandise: Cold reduced electrolytic tinplate; aluminum alloy sheet or strip.
Factory: Findlay, OH.
Statement signed: July 16, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, November 5, 1981.

(E) Company: Beecham, Inc.
Articles: Disodium ticarcillin, sterile bulk and blend; various finished goods such as injectables.
Merchandise: Monosodium ticarcillin.
Factory: Piscataway, NJ.
Statement signed: October 15, 1981.

Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New York, October 28, 1981.

(F) Company: Bic Pen Corp.
Articles: Butane lighters.
Merchandise: Flints, valve housings, spark wheels, body reliefs, o-rings, setting rings, and cheeks.
Factory: Milford, CT.
Statement signed: June 18, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs; New York, October 23, 1981.

(G) Company: Cabot Berylco, Inc.
Articles: Ingots, bars, anodes, cathodes, rods, sheet, shot, slabs, plates, strip, wire tubes, and billets of beryllium copper.
Merchandise: Beryllium copper master alloy.
Factory: Muhlenberg Township, PA.
Statement signed: October 9, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: New York, November 27, 1981.

(H) Company: Dairy Service Corp.
Articles: Orange juice from concentrate, frozen concentrated orange juice, and citrus drink bases.
Merchandise: Concentrated orange juice for manufacturing.
Factory: Brooksville, FL.
Statement signed: October 26, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Miami, November 4, 1981.
Revokes: T.D. 77-293-D.

(I) Company: GAF Corp.
Articles: Unexposed, sensitized photographic film.
Merchandise: Silver nitrate.
Factory: Binghamton, NY.
Statement signed: June 3, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: New York, November 12, 1981.

(J) Company: GTR Chemical Co., Div. of General Tire & Rubber Co.
Articles: Polyvinyl chloride (PVC).
Merchandise: Vinyl chloride monomer.
Factories: Ashtabula, OH; Point Pleasant, WV.
Statement signed: June 3, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: New York, October 23, 1981.

(K) Company: Ganes Chemicals, Inc.
Articles: Phenylephrine base; phenylephrine hydrochloride.
Merchandise: Meta-aminoacetophenone.
Factories: Carlstadt and Pennsville, NJ.
Statement signed: June 25, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New York, November 12, 1981.

(L) Company: The B. F. Goodrich Co.
Articles: Polyvinyl chloride (PVC) resins and compounds.
Merchandise: Titanium dioxide.
Factories: Various factories as listed in manufacturer's statement.
Statement signed: September 29, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, November 18, 1981.

(M) Company: ITT Meyer Industries, Division of ITT Grinnell Corp.
Articles: Power transmission poles (poles, base plates, and cross arms).
Merchandise: Hot-rolled, low-alloy, structural-quality, carbon steel plate.
Factories: Hager City, WI; Hazleton, PA.
Statement signed: October 23, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Chicago, November 30, 1981.
Revokes: T.D. 75–56–0.

(N) Company: Interpace Corp.—Lapp Div.
Articles: High voltage insulators.
Merchandise: Malleable iron castings.
Factories: Le Roy, NY; Sandersville, GA.
Statement signed: October 6, 1981.
Basis of claim: Appearing in.

Rate forwarded to Regional Commissioner of Customs: Boston, November 5, 1981.
Revokes: T.D. 80–62–Q and T.D. 80–297–N.

(O) Company: Juice Bowl Products, Inc.
Articles: Tomato juice from concentrate, vegetable cocktail and bloody Mary mix.
Merchandise: Tomato paste.
Factory: Lakeland, FL.
Statement signed: May 22, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Miami, October 28, 1981.

(P) Company: Kalsec, Inc.
Articles: Oleoresins made from paprika or chillies (capsicum) or both in condition as extracted or finished or blended with vegetable oils.
Merchandise: Ground paprika; oleoresin capsicum; oleoresin paprika.
Factory: Kalamazoo, MI.
Statement signed: May 27, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Chicago, October 23, 1981.

(Q) Company: Eli Lilly and Co.
Articles: Tylan (Tylosin phosphate); Tylocine (Tylosin); Tylosin (Tylosin Phosphate) and Tylosin Tartrate.
Merchandise: Sulfamethazine, feed grade and granulated; betaine anhydrous; tylosin phosphate concentrate
Factories: Omaha, NE; Clinton, Lafayette and Indianapolis, IN.
Statement signed: August 13, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Chicago, November 12, 1981.
Revokes: T.D. 80–200–0.

(R) Company: Locke Insulators, Inc.
Articles: Suspension insulators, switch and bus insulators (cap and pin type), post insulators, and assembled apparatus insulators.
Merchandise: Iron castings and steel forgings.
Factory: Baltimore, MD.
Statement signed: October 8, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, November 27, 1981.

(S) Company: Lotte U.S.A., Inc.
Articles: Chewing gum; chewing gum base; confections.
Merchandise: Natural resin; synthetic resin; wax; rubber; chewing gum base; sugar; Talc $CaCo_3$; monoglyceride; sorbitol; corn syrup.
Factory: Battle Creek, MI.
Statement signed: April 27, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Chicago, October 8, 1981.

(T) Company: Monsanto Co.
Articles: Nylon flake (polymer); nylon yarns; cerex.
Merchandise: Adiponitrile.
Factories: Decatur, AL; Pensacola, FL; Greenwood and Blackburg, SC.
Statement signed: August 14, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioners of Customs: Chicago and New York, November 13, 1981.

(U) Company: Nicolet Magnetics Corp.
Articles: Fourier transform nuclear magnetic resonance spectrometer systems.
Merchandise: High-resolution nuclear magnetic resonance superconducting magnets.
Factory: Mountain View, CA.
Statement signed: October 22, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, November 27, 1981.

(V) Company: Precision Valve Corp.
Articles: Finished valves.
Merchandise: Mounting cups; valve springs.
Factory: Yonkers, NY.
Statement signed: August 26, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New York, November 3, 1981.

(W) Company: Seagate Technology.
Articles: Disc storage drives.
Merchandise: Various component parts of disc storage drives.
Factory: Scotts Valley, CA.
Statement signed: July 29, 1981.

Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, October 28, 1981.

(X) Company: Spanco Industries, Inc.
Articles: Covered yarn styles L40–107–23 and L70–107–25.
Merchandise: Nylon yarn with "Z" twist.
Factory: Sanford, NC.
Statement signed: June 23, 1981.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New York, November 25, 1981.

(Y) Company: Sun-Maid Growers of California.
Articles: Processed seedless raisins, Muscat and Currant.
Merchandise: Unprocessed seedless raisins, Muscat raisins and Currant raisins.
Factory: Kingsburg, CA.
Statement signed: July 22, 1981.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, November 30, 1981.

(Z) Company: Volkswagen of America, Inc.
Articles: Automotive stampings, subassemblies, automobiles and trucks.
Merchandise: Cold rolled sheet steel and zincrometal.
Factories: South Charleston, WV; New Stanton, PA.
Statement signed: July 20, 1981.
Basis of claim: Used in, less valuable waste.
Rate forwarded to Regional Commissioner of Customs: New York, November 27, 1981.
Revokes: T.D. 81–156–Y.

(T.D. 82–12)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued July 27, 1981, to September 17, 1981, inclusive, pursuant to sections 22.1 through 22.5, inclusive, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(a), the name of the company, the specified articles on which drawback is authorized, the merchandise which will

be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner who issued the rate, and the date on which it was signed.

DRA-1-09, 213905

Dated: January 7, 1982.

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Allen-Edmonds Shoe Corp.
Articles: Mens shoes.
Merchandise: Imported calfskin leather.
Factory: Belgium, WI.
Statement signed: August 5, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Chicago, August 21, 1981.

(B) Company: American GFM Corp.
Articles: Crankshaft milling machines and forging machines.
Merchandise: Imported component parts of crankshaft milling machines and forging machines.
Factory: Chesapeake, VA.
Statement signed: September 1, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Baltimore, September 16, 1981.

(C) Company: American Thermoplastics Corp., subsidiary of Phillips Petroleum Co.
Articles: Polyethylene, polypropylene and polystyrene, white, color concentrates.
Merchandise: Imported titanium dioxide pigment.
Factories: Houston, TX; Calumet City, IL.
Statement signed: May 15, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: New York, September 9, 1981.

(D) Company: Buckman Laboratories, Inc.
Articles: DCDIC (32% disodium cyanodithioimidocarbonate) Busan 881 and NABE-M; Busan 882 and NABE.
Merchandise: Imported Aero cyanamid solution 50%.

359-831 O - 82 - 3

Factory: Memphis, TN.
Statement signed: July 22, 1981.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs: New Orleans, August 11, 1981.

(E) Company: Burroughs Corp.
Articles: Computers.
Merchandise: Imported controllers, cassette drive assemblies, printed circuit boards, yokes, displays, connectors, frames and keyboards.
Factory: Piscataway, NJ.
Statement signed: July 9, 1981.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs: San Francisco, August 4, 1981.

(F) Company: Carolina Mills, Inc.
Articles: Spun yarn.
Merchandise: Imported viscose rayon staple fiber, solution dyed white.
Factory: Lincolnton, NC.
Statement signed: February 11, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: New York, August 12, 1981.

(G) Company: Devon Industries International, Inc.
Articles: Needle counters and skinmarkers.
Merchandise: Imported unsterilized surgical skinmarkers and rubber magnets.
Factory: Northridge, CA.
Statement signed: September 22, 1980
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs: Los Angeles, August 28, 1981.

(H) Company: E. I. du Pont de Nemours and Co.
Articles: Video tape cassettes and magnetic tape rolls.
Merchandise: Imported polyester film and cassette shells.
Factories: Newport and Wilmington, DE.
Statement signed: August 18, 1981.
Basis of claim: Appearing in as to cassettes; used in as to polyester film.
Rate issued by Regional Commissioner of Customs: Baltimore, September 17, 1981.

(I) Company: EMI Medical Inc.
Articles: EMI Model 7000 scanners.
Merchandise: Imported image consoles, operator consoles, diagnostic consoles, MTU controls and MTU decks.
Factory: Northbrook, IL.
Statement signed: June 30, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Chicago, July 27, 1981.

(J) Company: Exxon Company, U.S.A.
Articles: Intermediate bunker fuel.
Merchandise: Imported marine diesel and No. 6 fuel.
Factory: Norfolk, VA.
Statement signed: August 25, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Houston, September 3, 1981.

(K) Company: Hopkins Agricultural Chemical Co.
Articles: Sodium TCA liquid weed killer.
Merchandise: Imported sodium trichloroacetate technical granules.
Factories: Atlanta, IL; Randolph, WI.
Statement signed: August 18, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Chicago, September 4, 1981.

(L) Company: Italtractor America, Inc.
Articles: Track groups or track chains with shoes, front idlers and track rollers.
Merchandise: Imported tractor parts, which include track chain, track shoes, track roller shells and components, track idler wheels and components, track sprockets, and bolts and nuts.
Factory: Addison, IL.
Statement signed: July 27, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Chicago, September 9, 1981.

(M) Company: Keystone Valve Co.
Articles: Butterfly valves.
Merchandise: Imported valve disc stem castings.
Factory: Houston, TX.
Statement signed: June 17, 1980.

Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs: Houston, September 8, 1981.

(N) Company: Maclin-Zimmer-McGill Tobacco Co.
Articles: Sorted and stemmed tobacco; blended strips.
Merchandise: Imported scrap tobacco, flue cured and burley stemmed tobacco and various manipulated Turkish tobacco.
Factory: Petersburg, VA.
Statement signed: March 9, 1981.
Basis of claim: Appearing in as to sorted and stemmed tobacco; used in as to blended strips.
Rate issued by Regional Commissioner of Customs: New York, August 20, 1981.
Revokes: T.D. 79–234–R.

(O) Company: Michelin Tire Corp.
Articles: Rubberized (calendered) tire fabric.
Merchandise: Imported single-ply rayon yarns.
Factories: Sandy Springs, Greenville, Spartanburg, and Lexington, SC; Dothan, AL.
Statement signed: July 22, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Miami, August 20, 1981.
Revokes: T.D. 79–216–P.

(P) Company: Morgen Manufacturing Co.
Articles: Conveyors.
Merchandise: Imported diesel engines.
Factory: Yankton, SD.
Statement signed: July 31, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Chicago, August 10, 1981.

(Q) Company: Mosley Machinery Co., Inc.
Articles: Carrier mounted cranes.
Merchandise: Imported Perkins diesel engines.
Factory: Waco, TX.
Statement signed: August 24, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Houston, September 9, 1981.

(R) Company: Novatec Inc.
Articles: Paper shredders, balers, compactors (completely assembled).
Merchandise: Imported parts for paper shredders, balers and compactors.
Factory: Sanford, NC.
Statement signed: July 27, 1981.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs: Miami, September 14, 1981.

(S) Company: Oxy-Dry Corp.
Articles: Airtech exhaust systems.
Merchandise: Imported wax bars, wax cabinets, air cabinets and electric cabinets.
Factory: Elk Grove Village, IL.
Statement signed: July 7, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Chicago, July 29, 1981.
Revokes: T.D. 78–301–V.

(T) Company: Pepsi-Cola Manufacturing Co., Inc.
Articles: Pepsi-Cola concentrate ingredients "B" "B1–DS", "ABDS", "B2–D", "Liquid acidulant #1", and "Mountain Dew acidulant".
Merchandise: Imported caffeine anhydrous.
Factory: Cidra, PR.
Statement signed: May 27, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Miami, August 7, 1981

(U) Company: Prodrill Supply Co.
Articles: Jack up rig (offshore drilling platform).
Merchandise: Imported knocked-down stifleg derrick including single drum hoist and chain driven hydraulic swinger.
Factory: Port Arthur, TX.
Statement signed: May 1, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: New York, August 12, 1981.

(V) Company: R–M Industries, Inc.
Articles: 4–t–butylcatechol (TBC).
Merchandise: Imported pyrocatechol.

Factory: Fort Mill, SC.
Statement signed: July 27, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Baltimore, August 5, 1981.

(W) Company: Rickel Manufacturing Corp.
Articles: Self-propelled fertilizer and sludge applicator equipment.
Merchandise: Imported diesel engines.
Factory: Salina, KS.
Statement signed: July 17,1981.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs: Chicago, July 29, 1981.

(X) Company: Sunbrite Dye Co., Inc.
Articles: Bleached and dyed piece goods.
Merchandise: Imported piece goods.
Factory: Passaic, NJ.
Statement signed: February 10, 1981.
Basis of claim: Used in, less valuable waste.
Rate issued by Regional Commissioner of Customs: New York, August 12, 1981.

(Y) Company: Teledyne Allvac.
Articles: Titanium alloy mill products—ingot, billet, bar.
Merchandise: Imported titanium sponge.
Factory: Monroe, NC.
Statement signed: August 21, 1981.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs: Baltimore, September 3, 1981.
Revokes: T.D. 80–296–X

(Z) Company: Tranoco, Inc.
Articles: Lignoferro picker sticks.
Merchandise: Imported picker stick panels from clear Red Beech veneers.
Factory: Greenville, SC.
Statement signed: April 8, 1981.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs: Miami, September 1, 1981.

19 CFR Part 18

(T.D. 82-13)

Customs Regulations Amended Relating to the Assessment of Liquidated Damages Under Carrier's Bonds

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Bonded carriers are responsible for shortages, irregular deliveries, or nondeliveries of imported merchandise received by them to be transported from one port to another. In the case of any shortage, failure to deliver, or direct delivery to the consignee or other person of any duty-free merchandise, the bonded carrier is subject to a penalty imposed by Customs as liquidated damages.

Customs has determined that the previous maximum penalty (an amount equal to the value of the merchandise not to exceed $25 in any one shipment) has failed to act as a deterrent to future violations and does not cover the administrative costs of processing the penalty. This document amends the Customs Regulations to increase the penalty to a minimum of $50 and a maximum of $100, in any one shipment, to be determined within the discretion of the district director.

Bonded carriers are also responsible for any internal revenue taxes or other taxes due to the United States on the missing merchandise. While customs duties are included in these taxes, they were not expressly mentioned. Accordingly, this document also amends the Customs Regulations to include the term "duties" within the category of liabilities assumed by bonded carriers for shortage, nondelivery, or irregular delivery of merchandise.

EFFECTIVE DATE: April 14, 1982.

FOR FURTHER INFORMATION CONTACT: Legal aspects: William G. Rosoff, Carriers, Drawback and Bonds Division, 202-566-5856; Operational aspects: Thomas Hargrove, Cargo Processing Division, 202-566-5354; U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, when merchandise is imported into the United States, it must be entered for Customs purposes at the first port at which

the merchandise arrives. However, under certain circumstances, imported merchandise may be placed in a Customs bonded warehouse or transported from the first port in the United States to another port. This procedure postpones final Customs formalities, including payment of duties due, until the merchandise arrives at the other port. The merchandise then may be entered, warehoused, or exported. In order to forward imported merchandise to another port, the merchandise must be transported in bond; that is certain Customs documents are required to support the movement and the carriers must be bonded by Customs for this purpose. Carriers bonded to transport merchandise in bond must follow certain procedures specified in Part 18, Customs Regulations (19 CFR Part 18), and they will incur penalties if shipments, together with the necessary documents, are not properly transported and delivered to Customs at the port of destination.

Section 18.10, Customs Regulations (19 CFR 18.10), lists five types of entries or withdrawals which may be made for merchandise to be transported in bond. Under section 18.8, Customs Regulations (19 CFR 18.8), carriers of merchandise transported in bond are responsible for any shortage, irregular delivery, or nondelivery at the port of destination or port of exit of bonded merchandise received by them. If there is a shortage, irregular delivery, or nondelivery, the bonded carrier is assessed liquidated damages under its bond. The amount of the liquidated damages depends on the dutiable status of the merchandise and the type of nonperformance by the carrier.

By a notice published in the Federal Register on December 30, 1980 (45 FR 85780), Customs stated that it had determined that the maximum amount of penalty imposed under section 18.8(b)(1), Customs Regulations (19 CFR 18.8(b)(1)), as liquidated damages assessed against the carrier's bond for shortage, nondelivery, or irregular delivery of duty-free merchandise, was insufficient to act as a deterrent to future violations.

Section 18.8(b)(1) provides that if there is a shortage, irregular delivery, or nondelivery of duty-free merchandise, the penalty to be imposed as liquidated damages will be an amount equal to the value to the missing merchandise, not to exceed $25 in any one shipment. However, the $25 maximum penalty permitted in section 18.8(b)(1) does not nearly meet the administrative costs to Customs of processing claims for liquidated damages. In a study performed in the Houston, Texas, Customs Region, it was concluded that the cost of processing the simplest liquidated damages case is $41.50. The cost to Customs has increased since that study was made.

Accordingly, Customs proposed to amend section 18.8(b)(1) to increase the amount of the liquidated damages that can be assessed

to a minimum of $50 and maximum of $100, in any one shipment, to be determined within the discretion of the district director.

In the notice of December 30, 1980, Customs noted that in addition to the penalties prescribed by section 18.8(b)(1), section 18.8(c), Customs Regulations (19 CFR 18.8(c)), provides that the bonded carrier also is responsible to pay any internal revenue taxes or other taxes owed to the United States on the missing merchandise, as well as all costs, charges, and expenses caused by failure to make the required transportation, report, and delivery. Although the provisions of section 18.8(c) have been used to collect customs duties under a carrier's bond on any missing merchandise, and the authority to collect duties under the carrier's bond has been recognized by the U.S. Customs Court in *Art Craft Jewelry Co.* v. *United States*, 64 Cust. Ct. 414, C.D. 4010 (1970), the term "duties" did not expressly appear in section 18.8(c).

Accordingly, for the purpose of clarity, Customs proposed to amend section 18.8(c) to expressly include the term "duties" among the liabilities imposed upon a carrier in the case of shortage, nondelivery, or irregular delivery of merchandise.

Pursuant to the notice interested parties were given until March 2, 1981, to submit comments on the proposal. Six commenters responded to the notice. After a review of the comments, Customs is adopting the amendments as proposed.

Discussion of Comments

One commenter stated that increasing the amount of the penalty is only a partial solution to the problem. He believes that the number of violations could be reduced significantly by ensuring that the delivering carrier receives a copy of Customs Form 7512, signed by the Customs officer at the port of destination. The commenter indicates that the signed copy should be proof that the carrier had fulfilled its obligations and its liability would be released. Customs believes this suggestion has merit and will study this matter further.

One commenter generally supports the proposal but believes the increased amounts are still inadequate. Another believes that the increased amounts would not act as a deterrent but would help cover only the administrative costs of processing these cases. Customs believes that the higher amounts of the penalties will act as a deterrent, that there will be fewer violations and, therefore, the overall administrative cost of processing these cases would be reduced.

Another commenter notes that most claims arise in situations where Customs has not had the opportunity to appraise the missing merchandise or determine whether or not it is duty-free. He further

359-831 O - 82 - 4

notes that the manifest description is usually insufficient for making a judgement. He suggests that section 18.8(b)(1) be amended further to state that the district director must be satisfied that the merchandise is duty-free or otherwise, liquidated damages would be assessed under section 18.8(b)(2), the provision for dutiable merchandise. Customs does not believe this amendment is necessary because in practice, that is the procedure which is being, or should be, followed.

The commenter agrees that the word "duties" should be included in section 18.8(c) but suggests that guidelines be included in the Customs Fines, Penalties, and Forfeitures Handbook to explain the phrase "cost, charges, and expenses caused by the failure to make the required * * * delivery." Customs believes the suggestion has merit; however, it will be reviewed separately because it is beyond the scope of this document.

Another commenter states that while agreeing that the $25 limit does not cover the administrative cost of processing a penalty for Customs, the same is true for airlines. The commenter suggests that if Customs mandates an increase in the penalty amount in order to recoup the costs associated in assessing liquidated damages, Customs should credit the airline for a like amount whenever the carrier can and does provide evidence that the duty-free shipment was properly handled. Customs is a law enforcement agency which is charged with the responsibility of administering numerous laws and regulations, such as investigating violations of section 18.8. Customs endeavors to minimize its own administrative expenses as well as the expenses which the other party must bear. However, Customs can not credit the party any expense it incurred.

This commenter cites figures purporting to show that 50 percent of all penalty cases are closed without collection of assessed damages because carriers are able to produce evidence of compliance at least 50 percent of the time. The commenter also states that less than 1 percent of all in-bond transactions required investigation and that 85 percent of the investigations were concluded without imposing penalties or liquidated damages because no violation actually occurred. The commenter claims that these figures indicate that the proposed penalty increase has not been justified, nor has Customs shown that the airlines are negligent in the handling of in-bond duty-free merchandise.

Customs does not dispute the assertion that only 1 percent of all transactions require investigation. However, Customs notes that 1 percent of an annual volume of 1.7 million in-bond transactions is a substantial number. Customs has not singled out airlines because the proposed increase is directed towards all carriers.

The commenter cites the President's regulatory reform program

and refers to Executive Order 12291 of February 17, 1981. He notes that the Executive Order requires that costs be carefully reviewed, and the potential benefits to society from a regulation outweigh the potential costs to society.

Customs supports fully the President's regulatory reform program and the mandates of Executive Order 12291. By raising the penalty amount, Customs believes there will be fewer violations of section 18.8(b)(1), which would be a benefit to the public. At the same time, overall costs in administering section 18.8(b)(1) would be reduced.

Another commenter claims that because section 18.8(c) has been used to collect customs duties under a carrier's bond on any missing merchandise, it is unreasonable to subject the carrier to liquidated damages when the duties owing on the lost or irregular shipment are paid to Customs in any event. An importer is primarily liable for payment of duties; however, independent of that liability, a carrier who loses merchandise also could become liable for payment of duty. As a matter of policy under the quantity control program, Customs generally collects duty from an importer only on the merchandise actually received. Any shortage is presumed to have occurred while in the carrier's possession and, therefore the carrier is treated by Customs as being responsible for that loss. Customs will collect from the carrier duty on the missing merchandise. However, there are other damages suffered by Customs under the bond. Liquidated damages under the carrier's bond are assessed because of breach of the bond.

The commenter questions Customs assumption that an increase in the penalty will act as deterrent. Customs agrees with the commenter that carriers have very compelling incentives for preventing loss or damage to cargo, such as loss of customers. However, Customs maintains that the assessment of higher penalties will make carriers even more careful.

The commenter objects to Customs citation of increasing administrative costs as a basis for increasing the penalty, especially in light of the President's policy of increasing the efficiency, rather than the cost, of Federal Government regulation. The commenter suggests that Customs efforts be directed toward reducing, rather than increasing, the cost of administering its regulations.

Customs agrees that it is essential to operate as efficiently as possible and to reduce the costs of administering its regulations wherever possible. Of course, reducing administrative costs during an inflationary period is very difficult. It is anticipated that there will be fewer violations of section 18.8(b)(1) because of the deterrent effect of the increased penalty. This will reduce Customs overall administrative cost of processing these cases. Of course, an improvement in the per-

formance of carriers would be of great assistance in reducing Customs costs.

The commenter questions the validity of the study performed in the Houston, Texas, Customs Region which concluded that the cost of processing the simplest liquidated damages case is $41.50. The commenter notes that the study was performed at a seaport, not at an airport, and claims Customs has not demonstrated that data collected at the seaport is respresentative of air cargo transportation. The commenter claims that Customs has not explained why the $50 minimum to $100 maximum penalty is necessary to cover average administrative costs ($41.50) of less than those amounts.

Customs notes that its study was conducted at several seaports. However, because the forms and procedure for processing a section 18.8(b)(1) violation are the same at a seaport and an airport, Customs believes that the administrative costs would be similar. The new dollar amounts are necessary because the monetary penalty is intended to be a deterrent and not merely to recover administrative costs.

The commenter also discusses a matter relating to amending sections 171.31 and 172.31, Customs Regulations (19 CFR 171.31, 172.31). This subject is outside the scope of this document but will be studied as a separate project.

CUSTOMS FORMS

During the 90-day delayed effective date of this document, Customs Form 3587, "Carrier's Bond," Customs Form 3588, "Private Carrier's Bond," and Customs Form 3855, "Bond of Customs Cartman or Lighterman" will be revised by Customs Headquarters to conform to the amendments made in this document. A bond rider will be prepared for each bond and distributed to Customs field personnel. The bond rider will be executed and attached to the Customs bonds already on file before the delayed effective date. The bond rider also would be attached to all applicable bonds that are executed and filed after the delayed effective date. Use of the rider would eliminate the need for printing new bond forms at this time. However, as supplies of these forms are exhausted, the public will be provided with the new forms containing the revised language.

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

Sections 18.8 (b)(1) and (c), Customs Regulations (19 CFR 18.8 (b)(1), (c)), are revised to read as follows:

§ 18.8 Liability for shortage, irregular delivery, or nondelivery; penalties.

* * * * * * *

(b) Penalties imposed as liquidated damages under the carrier's

bond for shortage, failure to deliver, or irregular delivery shall be as follows:

(1) In the case of shortage, failure to deliver, or delivery direct to the consignee or other person of any merchandise free of duty, a minimum of $50 and a maximum of $100, in any one shipment, to be determined within the discretion of the district director.

* * * * * * *

(c) In addition to the penalties described in paragraph (b) of this section, the carrier shall pay any internal-revenue taxes, duties, or other taxes accruing to the United States on the missing merchandise, together with all costs, charges, and expenses caused by the failure to make the required transportation, report, and delivery.

(R.S. 251, as amended, and section 551, 623, 624, 46 Stat. 742, as amended, 759, as amended (19 U.S.C. 66, 1551, 1623, 1624))

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of sections 603 and 604 of title 5, United States Code (as added by section 3 of Pub. L. 96–354, the "Regulatory Flexibility Act") because it was the subject of a notice of proposed rulemaking issued before January 1, 1981, the effective date of the Act.

E.O. 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Charles D. Ressin, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENT TO THE REGULATIONS

Part 18, Customs Regulations (19 CFR 18), is amended as set forth below.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved:
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register Jan. 14, 1982 (47 F.R. 2086)]

19 CFR Part 6

(T.D. 82-14)

Transportation or Transit Air Cargo to an Interior Port of Destination, Customs Regulations Amended

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to clarify that the penalties imposed as liquidated damages under a common carrier's bond for failure to deliver merchandise to Customs, are applicable where cargo arriving in the United States by aircraft for transportation in, through, or from the United States by aircraft, is not delivered within the specified time limit. The amendment is being made to avoid any possible misunderstanding regarding the applicability of the penalty provisions.

EFFECTIVE DATE: Jan. 14, 1982.

FOR FURTHER INFORMATION CONTACT: Benjamin H. Mahoney, Entry Procedures and Penalties Division, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Cargo (including manifested baggage) arriving in the United States by aircraft to be transported subject to Customs control in, through, or from the country by aircraft is known as transit air cargo. Such cargo must be transported in accordance with the provisions of Part 6, Customs Regulations (19 CFR Part 6).

As a more expeditious alternative to the procedure set forth in section 6.15, Customs Regulations (19 CFR 6.15), for transporting merchandise in bond, section 6.18, Customs Regulations (19 CFR 6.18), provides that the Air Cargo Manifest, Customs Form 7509, printed, stamped, or labeled "Transportation Entry and Transit Air Cargo Manifest," may be used as the transportation entry and the manifest for transit air cargo transported under a common carrier's bond.

The Customs Regulations pertaining to the movement of transit air cargo are set forth in sections 6.18 through 6.24, Customs Regulations (19 CFR 6.18-6.24). Section 6.22(c), provides that transit

air cargo must be delivered to Customs at destination within 15 days from the date of receipt by the forwarding carrier at the port of arrival. Under section 6.22(e), penalties imposed as liquidated damages under the common carrier's bond for failure to deliver merchandise must be the same as prescribed in section 18.8, Customs Regulations (19 CFR 18.8). While section 18.8 sets forth the penalty for failure to deliver merchandise, it does not specify a time period during which the delivery must occur.

In response to a request for clarification, Customs Headquarters determined that the penalties imposed under the common carrier's bond for failure to deliver merchandise, set forth in section 18.8, apply to air transit cargo which is not delivered within the 15-day period specified in section 6.22(c). Accordingly, section 6.22(e) must be amended to clarify the applicability of section 18.8 to section 6.22.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Because this amendment does not change established policy or procedure and merely clarifies an existing regulation, it is considered to be an interpretative rule and notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d)(2), a delayed effective date is not provided because it is not required for an interpretative rule.

EXECUTIVE ORDER 12291

Because this will not result in a "major" rule as defined in section 1(b) of Executive Order 12291, the regulatory impact analysis and review prescribed by section 3 of the Executive Order is not required.

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of sections 603 and 604 of title 5, United States Code (as added by section 3 of Pub. L. 96–354, the "Regulatory Flexibility Act") because it is an interpretative rule, merely clarifying an existing regulation without changing established policy or procedure.

DRAFTING INFORMATION

The principal author of this document was Lawrence P. Dunham, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENT TO THE REGULATIONS

Section 6.22(e), Customs Regulations (19 CFR 6.22(e)), is amended to read as follows:

6.22 Transportation of transit air cargo to an interior port of destination.

* * * * * * *

(e) Penalties imposed as liquidated damages under the common carrier's bond for shortage, failure to deliver, etc., must be the same as prescribed in section 18.8 of this chapter. The penalty set forth in section 18.8 for failure to deliver merchandise shall apply to the failure to deliver merchandise within the time period set forth in section 6.22(c). Under that section the basis for the assessment of liquidated damages is the value of the merchandise. The transit air cargo manifest does not reflect value. Therefore, when it is necessary to determine the value of merchandise shipped as transit air cargo, the value must be determined by the district director on the basis of the data or documents specified in paragraph (d) of this section and such other information available to him relating to merchandise of the same or similar description or origin. However, when the data or documents required to be furnished by paragraph (d) of this section are not received within the 90-day period prescribed, the district director will make his determination of value on the basis of such other information available to him.

(R.S. 251, as amended, sec. 551, 623, 624, 644, 46 Stat. 742, *et seq.*, as amended, sec. 904, 1109, 72 Stat. 787, *et seq.*, as amended and sec. 101, 76 Stat. 72, as amended (19 U.S.C. 66, 1551, 1623, 1624, 1644, 49 U.S.C. 1474, 1509), General Headnote 11, Tariff Schedules of the United States (19 U.S.C. 1202)).

GEORGE C. CORCORAN,
Acting Commissioner of Customs.

Approved: December 15, 1981.
JOHN M. WALKER, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register Jan. 14 1982 (47 F.R. 2085)]

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19 CFR Part 101

(T.D. 82-15)

Customs Regulations Amendment Relating to the Field Organization of the Customs Service

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document changes the field organization of the Customs Service by modifying the description of the port limits of the recently consolidated Houston-Galveston, Texas, Customs port of entry to include territory lying between the corporate limits of both Houston and Galveston. The change is being made to connect Harris and Galveston Counties to form a continuous path from Houston to Galveston, which is necessary to complete the consolidated port of entry.

EFFECTIVE DATE: July 2, 1981.

FOR FURTHER INFORMATION CONTACT: Renee DeAtley, Office of Inspection, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202–566–8157).

SUPPLEMENTARY INFORMATION:

BACKGROUND

By T.D. 81–160, published in the Federal Register on June 2, 1981 (46 FR 29462), section 101.3, Customs Regulations (19 CFR 101.3), was amended, among other things, to consolidate the Customs ports of entry of Houston and Galveston, Texas, into the single Houston-Galveston, Texas, Customs port of entry. In consolidating the two ports, Customs intended to establish one combined port of entry encompassing an area between Houston and Galveston and stated that the Houston-Galveston port limits would include all of the territory within the existing port limits of Houston and Galveston. However, following publication of the document, Customs determined that the geographical description of the newly consolidated Houston-Galveston port of entry limits did not reflect accurately all of the land area which was to be encompassed by the merger. The notice failed to incorporate that area of Galveston County between Clear Lake and Clear Creek on the north, Texas City on the south, the Texas shore line on the east and the Brazoria/Galveston County border on the west. Because the ports must be connected physically, the description of the consolidated Customs port of entry needs to be modified to include the omitted area.

Accordingly, Customs has determined to amend section 101.3, Customs Regulations (19 CFR 101.3), to make this change.

CHANGE IN THE CUSTOMS FIELD ORGANIZATION

Under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and

359-831 O - 82 - 5

pursuant to authority provided by Treasury Department Order No. 101–5 (46 FR 9336), the description of the port limits of the consolidated Houston-Galveston, Texas, Customs port of entry is modified to include that area of Galveston County bounded by Clear Lake and Clear Creek on the north, Texas City on the south, the Texas shore line on the east and the Brazoria/Galveston County border on the west.

AMENDMENT TO THE CUSTOMS REGULATIONS

To reflect this change, the list of Customs regions, districts, and ports of entry in section 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by substituting "The territory lying within the corporate limits of both Houston and Galveston, Texas, and the remaining territory in Harris and Galveston Counties, Texas (T.D. 81–160 and T.D. 81–15)." for "Houston-Galveston, Texas, including territory described in T.D. 54409 and Port Bolivar and Texas City (T.D. 81–160)." in the list of ports of entry in the Houston-Galveston district.

EXECUTIVE ORDER 12291

Because this will not result in a "major rule" as defined by section 1(b) of Executive Order 12291, the regulatory impact analysis and review prescribed by section 3 of the Executive Order is not required.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*), the Secretary of the Treasury has determined that the regulation set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, the regulation is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. This determination has been made because the amendment merely is a technical change to connect Harris and Galveston Counties to complete the combined port of entry.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE PROVISIONS

Because the change does not alter materially the amendments made by T.D. 81–160, which were developed after public participation, and because the amendment merely is a technical change connecting Harris and Galveston Counties to complete the combined port of entry pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are found to be unnecessary. Because the combined

port of entry already is in operation, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

DRAFTING INFORMATION

The principal author of this document was Lawrence P. Dunham, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: DEC 15 1981

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, Jan. 14, 1982 (47 F.R. 2088)]

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19 CFR Part 4

(T.D. 82-16)

Special Tonnage Tax and Light Money; Payment Exemption; People's Republic of China

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This rule amends the Customs Regulations by adding the People's Republic of China to the list of nations whose vessels are exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money. Satisfactory evidence has been furnished by the Department of State that no discriminating duties of tonnage or imposts are imposed in ports of the People's Republic of China upon vessels belonging to citizens of the United States or on their cargoes. This document provides reciprocal privileges to vessels registered in the People's Republic of China.

EFFECTIVE DATE: September 17, 1980.

FOR FURTHER INFORMATION CONTACT: Harold Singer, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, known as "light

money," on all foreign vessels which enter United States ports (46 U.S.C. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of proof satisfactory to the President that no discriminatory duties of tonnage or imposts are imposed by that foreign nation on United States vessels or their cargoes (46 U.S.C. 141). The President has delegated the authority to grant this exemption to the Secretary of the Treasury. Section 4.22, Customs Regulations (19 CFR 4.22), list those nations whose vessels have been exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

By letter dated September 19, 1980, the Department of State advised the Department of Treasury that satisfactory evidence exists, in the form of the U.S.-China Agreement on Maritime Transport and the U.S.-China Agreement on Trade Relations, that no discriminating duties of tonnage or imposts are imposed or levied in ports of the People's Republic of China upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported into the People's Republic of China on vessels from the United States. Consequently, the Department of State recommended that the People's Republic of China be added, effective September 17, 1980, to the list of nations whose vessels are exempted from the payment of the U.S. special tonnage tax and light money.

DECLARATION

Therefore, by virtue of the authority vested in the President by section 4228 of the Revised Statutes, as amended (46 U.S.C. 141), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951, as amended by Executive Order No. 10882, July 18, 1960 (3 CFR, 1959–1963 Comp., Ch II), and pursuant to the authorization provided by Treasury Department Order No. 101–5 (46 FR 9336), I declare that the foreign discriminating duties of tonnage and imposts within the United States are suspended and discontinued, in respect to vessels of the People's Republic of China and the produce, manufactures, or merchandise imported into the United States in such vessels from the People's Republic of China or from any other foreign country.

This suspension and discontinuance shall take effect from September 17, 1980, in respect to vessels of the People's Republic of China, and shall continue only for so long as the reciprocal exemptions of vessels

wholly belonging to citizens of the United States and their cargoes shall be continued.

AMENDMENT TO THE REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in the People's Republic of China, the list in section 4.22 Customs Regulations (19 CFR 4.22), of nations whose vessels are exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money, is amended by adding the People's Republic of China in appropriate alphabetical order.

(R.S. 251, as amended, 4219, as amended, 4255, as amended, 4228, as amended, section 3, 23 Stat. 119, as amended, section 624, 46 Stat. 759 (19 U.S.C. 66, 1624, 46 U.S.C. 5, 121, 128, 141))

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely implements a statutory requirment and involves a matter in which the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1)

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of sections 603 and 604 of title 5, United States Code, as added by section 3 of Pub. L. 96–354, the "Regulatory Flexibility Act." That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in section 1(b) of E.O 12291. Accordingly, a major impact analysis is not required.

DRAFTING INFORMATION

The principal authors of this document were Lawrence P. Dunham and Gerard J. O'Brien, Jr., Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel

from other offices of the Customs Service and the Departments of State and Treasury participated in its development.

Dated: Dec. 24 1981.

JOHN M. WALKER, JR.
Assistant Secretary of the Treasury.

[Published in the Federal Register Jan. 14, 1982 (47 F.R. 2084)]

(T.D. 82-17)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 USC 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
December 7, 1981–December 10, 1981	$0.000146
December 11, 1981	.000144
Chile peso:	
December 7, 1981–December 11, 1981	$0.025575
Colombia peso:	
December 7, 1981–December 10, 1981	$0.018083
December 11, 1981	.017986
Greece drachma:	
December 7, 1981–December 8, 1981	$0.017756
December 9, 1981	.017637
December 10, 1981	.017631
December 11, 1981	.017559
Indonesia rupiah:	
December 7, 1981–December 11, 1981	$0.001582
Israel shekel:	
December 7, 1981	$0.066225
December 8, 1981–December 9, 1981	.065189
December 10, 1981–December 11, 1981	.065104
Peru sol:	
December 7, 1981–December 10, 1981	$0.002119
December 11, 1981	.002020

South Korea won:
December 7, 1981–December 11, 1981 ..... $0.001446

(LIQ-01-03 O:C:E)

Dated: December 29, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

(T.D. 82-18)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 USC 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 81-269 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:
December 7, 1981–December 11, 1981 ..... $0.008255

Hong Kong dollar:
December 7, 1981 ..... $0.179308
December 8, 1981 ..... .179372
December 9, 1981 ..... .179211
December 10, 1981 ..... .177462
December 11, 1981 ..... .177778

Japan yen:
December 7, 1981 ..... $0.004597
December 8, 1981 ..... .004587
December 9, 1981 ..... .004579
December 10, 1981 ..... .004575
December 11, 1981 ..... .004560

Netherlands guilder:
December 7, 1981 ..... $0.408497
December 8, 1981 ..... .407000
December 9, 1981 ..... .407830

Switzerland franc:
December 7, 1981 ..... $0.553403
December 8, 1981 ..... .547345

December 9, 1981	.546448
December 10, 1981	.541565
December 11, 1981	.541712
United Kingdom pound:	
December 7, 1981	$1.9350
December 8, 1981	1.9265

(LIQ-03-01 O:C:E)

Dated: December 29, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

(T.D. 82-19)

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to Section 522(C), Tariff Act of 1930, as amended (31 USC 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Brazil cruziero:	
December 14, 1981—December 17, 1981	$0.008255
December 18, 1981	.008117
Hong Kong dollar:	
December 14, 1981	$0.177541
December 15, 1981	.177462
December 16, 1981	.177368
December 17, 1981	.176991
December 18, 1981	.176445
Japan yen:	
December 14, 1981	$0.004530
December 15, 1981	.004598
December 16, 1981	.004581
December 17, 1981	.004578
December 18, 1981	.004566
Switzerland franc:	
December 14, 1981	$0.541419
December 15, 1981	.545554

December 16, 1981	.547196
December 17, 1981	.548546
December 18, 1981	.546448

(LIQ-03-01 O:C:E)

Dated: December 31, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

(T.D. 82-20)

Foreign Currencies—Daily Rates For Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 USC 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Argentina peso:	
Dec. 14, 1981–Dec. 17, 1981	$0.000144
December 18, 1981	.000141
Chile peso:	
Dec. 14, 1981–Dec. 18, 1981	$0.025575
Colombia peso:	
Dec. 14, 1981–Dec. 17, 1981	$0.017986
December 18, 1981	.017007
Greece drachma:	
December 14, 1981	$0.017271
Dec. 15, 1981–Dec. 17, 1981	.017376
December 18, 1981	.017374
Indonesia rupiah:	
Dec. 14, 1981–Dec. 18, 1981	$0.001582
Israel shekel:	
Dec. 14, 1981–Dec. 15, 1981	$0.065104
December 16, 1981	.065232
Dec. 17, 1981–Dec. 18, 1981	.064851
Peru sol:	
Dec. 14, 1981–Dec. 18, 1981	$0.002020

359-831 O - 82 - 6

South Korea won:

Dec. 14, 1981–Dec. 17, 1981	$0.001438
December 18, 1981	.001436

(LIQ–01–03 O:C:E)

Dated: December 31, 1981.

KENNETH A. RICH,
Acting Chief,
Customs Information Exchange.

ERRATA FOR CUSTOMS BULLETIN

In CUSTOMS BULLETIN, Vol. 15, no. 47, dated November 25, 1981, in T.D. 81–281–N, on page 7, correct company name to read:
McGraw-Edison Co., Campbell Chain Div.

In CUSTOMS BULLETIN, Vol. 15, no. 47, dated November 25, 1981, in T.D. 81–281–Y, on page 9, correct line 5 to read:
and/or 55027(2)

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., January 7, 1982.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

DONALD W. LEWIS,
Director,
Office of Regulations and Rulings.

(C.S.D. 82-11)

Entry: The Applicable Rates of Duty on Certain Quota-Class Merchandise

Date: June 22, 1981
File: ENT-1-01 CO:R:E:E
715334 JV

This ruling concerns a Request for Internal Advice on the applicable rates of duty on certain quota-class merchandise.

Issue: Whether the entries involved in this request should be liquidated at the rates of duty in effect at the time the quota opened and closed on December 14, 1979, or in early January 1980, when the amended withdrawals were presented to Customs for payment.

Facts: In December 1979, iron or steel classifiable under items 607.01 through 607.04, Tariff Schedules of the United States (TSUS), were subject to quota restriction. The quota opened and closed on December 14, 1979, with allocations given by Headquarters on December 20, 1979. However, most of the withdrawals covering the allocations in question were not presented to Customs for payment until the period January 2, 1980, through January 9, 1980. Based on those presentation dates, Customs now wishes to calculate duty at the increased 1980 rates as applicable in TSUS items 606.00 through 606.06. The customshouse broker representing the importers

in this case contends that although the quota opened and closed on December 14, 1979, Headquarters allocation did not become known to the importers until much later in December, and, therefore it did not allow them sufficient time to present the proper withdrawals until after the new year. Under the circumstances, the broker maintains that the applicable 1979 rates of duty should apply in liquidating the entries.

Law and analysis: In Headquarters ruling dated March 25, 1981, referenced ENT–1–CO:R:E:E 713584 FBO, we held that the date of entry or withdrawal for quota merchandise filed at the opening of the quota when the quota is oversubscribed and transfer requests are made after the initial notification is the date of original presentation of the entry summary or warehouse withdrawal provided: (a) such transfer requests are filed within five working days after the date of the original authorization of the release of the merchandise; (b) an adjusted entry summary or warehouse withdrawal is filed within five working days after the date of the adjusted authorization of the release of the merchandise; and (c) the merchandise is released to the importer within 15 working days after the date of such adjusted au-authorization.

In the instant case, notice of the quota allocations to the field occurred on December 20, 1979. The broker was notified of the allocations on December 21, 1979. Therefore, the importer had five working days from that date to present the entry summaries and to deposit estimated duties or request transfer of allotments. A transfer request serves as an amended entry.

In the case of (importer A), the transfer request was made on December 28, 1979. The broker was notified of the transfer approval on December 31, 1979. In order for December 14, 1979 to be considered the date of presentation for quota and duty purposes, the importer had until January 8, 1980, to file the amended entry and to deposit estimated duties, and until January 22, 1980, to obtain release of the merchandise.

The transfer request by (importer B) was made on December 26, 1979. It was approved by Headquarters on December 27. The broker was notified of the approval on the same day. Therefore, in order for the December 14 date to apply, the importer had until January 4, 1980, to file the amended entry summary and deposit estimated duties, and until January 18, 1980, to obtain release of the merchandise.

The transfer request by (importer C) was made on December 21, 1979. It was approved on December 26, 1979. The broker was notified of the approval on the same day. In order for the December 14 date to apply, the importer had until January 3, 1980, to present the amended withdrawals, and until January 17, 1980, to obtain release of the merchandise.

According to Headquarters Quota Section, the withdrawals by (importers (D), (E), and (F)) were not involved in a category that filled at the opening of the quota. Therefore, there was no holdup by Headquarters which caused these entries to be filed in 1980 rather than in 1979. Under the circumstances, the entries filed by these companies should be liquidated at the applicable 1980 rates of duty.

Holding: In the case of (importers (A), (B), and (C)), we are unable to advise the inquirer as to whether the entries should be liquidated at the 1979 or 1980 rates, in the absence of information indicating the precise dates in January 1980 when the withdrawals were presented to Customs for payment and the merchandise released. The entries filed by (importers (D), (E), and (F)) are to be liquidated at the 1980 rates of duty.

(C.S.D. 82–12)

Classification: Three-Wheeled All-Terrain Cycles

Date: June 26, 1981
File: CLA-2 CO:R:CV:G
068246 JAS

AREA DIRECTOR OF CUSTOMS,
New York Seaport,
New York, New York

DEAR SIR: This is in response to your memorandum of August 8,1979 (CLA–2–06–S:C:DI–02 203), which set forth your views on whether an established and uniform practice (19 U.S.C. 1315(d)), exists in the classification of certain three-wheeled all-terrain cycles (ATC) from Japan. A notice proposing to change the practice of classifying ATCs under the tariff provision for other motor vehicles used to transport persons or articles, in item 692.10, Tariff Schedules of the United States (TSUS), was published in the Federal Register on November 28, 1980 (45 FR 79221). One comment was received in response thereto. Our position on the matter is hereinafter set forth.

These three-wheeled vehicles feature a T-shaped chassis and resemble a motorcycle but with two rear wheels. All three wheels are fitted with fat donut-type 22 x 11 tires which enable the vehicle to maneuver easily on all types of terrain. Their one cylinder engines range in size from 72cc to 105cc, and produce around 8hp. The ATC utilizes a handlebar for steering and has a seat that is straddled by the driver. The ATC does not normally exceed 302 lbs. in weight.

By way of background, in a letter dated July 15, 1970 (MFG 433. 7/005618), published as ORR 760–70, three-wheeled all-terrain vehicles were held to be classifiable under the tariff provision for other motor

vehicles (except motorcycles) for the transport of persons or articles, in item 692.10, TSUS. However, in a letter dated June 20,1977 (049919), the Electric Trike, a battery-powered three-wheeled vehicle, was held to be classifiable under the tariff provision for motorcycles, in item 692.50, TSUS. In another letter dated April 12, 1979 (057874), two models of the Honda ATC were held to be similarly classifiable.

In our cases 049919 and 057874, great weight was placed on *The Explanatory Notes to Brussels Nomenclature*, in holding three-wheeled vehicles to be classifiable in item 692.50, TSUS, and also in the National Highway Traffic Safety Administration (NHTSA) definition of a motorcycle as a "two-wheeled vehicle with motive power or a three-wheeled vehicle with motive power." It should be noted that the courts have held *Brussels* to be a useful source of legislative history with respect to the tariff schedules when a sufficient nexus can be found between it and the tariff schedules, that is, the order, language and phraseology of *Brussels* does not differ from the provisions of the tariff schedules. See *W. R. Filbin and Co., Inc.* v. *United States*, 63 Cust. Ct. 200, CD 3897 (1969), *M. Hohner Inc.* v. *United States*, 63 Cust. Ct. 496, CD 3942 (1969), and related cases. In this regard, the line heading to Explanatory Note 87.09 reads MOTOR-CYCLES, AUTO-CYCLES AND CYCLES FITTED WITH AN AUXILIARY MOTOR WITH OR WITHOUT SIDE-CARS; SIDE-CARS OF ALL KINDS. This heading is far broader in scope than item 692.50, TSUS, which covers only motorcycles. There is doubt, therefore, that a clear nexus exists between these two provisions, such that a legislative intent to classify three-wheeled vehicles, not having the character of motor vehicles, in item 692.50, TSUS, is not manifest.

The NHTSA definition of the term "motorcycle" is not persuasive for tariff purposes inasmuch as it is a definition dealing with non-tariff matters. See *International Spring Mfg. Co.* v. *United States*, Cust. Ct. CD 4862 (1980). Likewise, it is noted that the Society of Automotive Engineers (SAE) recognizes the existence of three-wheeled motorcycles, in designating them by "a vertical plane which passes through the center line of the single wheel and through the midpoint of the two wheels sharing the same axis of rotation." See SAE Designation J 213a. The SAE establishes various product and material standards in the automobile and steel industries. While Customs recognizes SAE designations for some purposes (i.e., drawback), such designations are guidelines only and are not persuasive as to common meaning of a term for tariff purposes.

The issue, in our opinion, is whether the ATC is embraced within the *eo nomine* designation for motorcycles, in item 692.50, TSUS. The meaning of a word in a tariff provision is determined by its "common meaning," which is presumed to be its commercial meaning.

See *United States* v. *C. J. Tower and Sons*, 48 CCPA 87, CAD 770 (1961).

Common meaning is to be determined as a matter of law, for which purpose recourse may be had to lexicographic sources such as dictionaries, scientific authorities, testimony of competent witnesses and other reliable sources of information. See *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, CAD 1088 (1973). Most lexicographic authorities define the term "motorcycle" to mean a motorized two-wheeled vehicle, or one having a third wheel only when a sidecar is attached. In none of the motorcycle trade magazines, brochures or other promotional literature of which we are aware, is the ATC characterized as a motorcycle. See *Audiovox Corp.* v. *United States*, Slip Op. 81–11 (1981). The Motorcycle Industry Council, a trade organization representing domestic motorcycle distributors (Yamaha, Suzuki, and Honda), all of whom distribute the ATC, informs us that it is bought, sold and referred to in the trade as an all-terrain cycle. It is not sold as a motorcycle. Most dealerships which we have informally surveyed in this area have separate sales departments for ATCs. The standard street motorcycle, off-highway dirt or trail bike, and moped are sold in a separate department.

In determining whether an article is embraced within an *eo nomine* designation, its use may be considered in order to establish its identity. See *United States* v. *Quon Quon Company*, 46 CCPA 70, CAD 699 (1959), and related cases. While motor cycles have both on and off-highway uses for transportation, recreation and competition, the ATC is strictly an off-highway cycle or vehicle. The trend in many midwestern states is to market the ATC as an off-road utility vehicle suitable for a wide variety of farming, commercial and industrial purposes. It is a suitable for hauling small farm wagons, to accommodate a snow plow, to pull stumps etc.

Classification should be determined largely by a consideration of the design, character, and purpose of the machine. See *Giddings & Lewis Machine Tool Co., et al.* v. *United States*, 61 Cust. Ct. 284, CD 3612 (1968). Mechanically, there are various similarities and differences between motorcycles and ATCs. Both have what is known as triple tree front suspensions and rigid axle rear suspensions. The motorcycle has shock absorbers while the ATC has none. Both have manual or automatic transmissions with no reverse gear. Both have interlocking brakes either disc or drum and shoe. These brakes are either foot and/or handlebar activated. However, while both the motorcycle and ATC have chain driven sprockets (the rear wheels are driven off a sprocket inside the engine by means of a chain) we are informed that many motorcycle models are shaft-driven as a passenger automobile would be. However, the ATC is never shaft-driven because of the need for positive drive on both rear wheels at the same time. This, together

with high flotation tires, gives the ATC its all-terrain capability, in much the same fashion as a four-wheel drive Jeep. Also, while both the motorcycle and the ATC possess internal combustion, gas fueled engines, the motorcycle engine is generally more powerful, that is, it ranges in size up to 1300cc. This is because the standard motorcycle has need for high rpm for speed purposes and does not generate torque or thrust as does the ATC. The ATC, on the other hand, has a one cylinder engine which ranges in size from 115 to 400cc. These low rpm engines generate the high torque needed at low speeds resulting in the increased pulling capacity for which the ATC is becoming increasingly popular.

In considering this matter we are mindful that while the meaning of an *eo nomine* designation is determined as of the effective date of the tariff statute it will include all articles subsequently created which fairly come within its scope. See *Hoyt, Stepston et al.* v. *United States*, 52 CCPA 101, CAD 865 (1965). However, it is equally true that for tariff purposes technological advancements, expanded markets and their effect on consumer expectations must be considered. While the evidence is by no means conclusive, it is our opinion that the ATC is not embraced within the common meaning of the term "motorcycle."

Consequently, three-wheeled all-terrain cycles of the type herein described are properly classifiable under the tariff provision for other motor vehicles of a type used to transport persons or articles, in item 692.10, TSUS. Our letter of April 12, 1979 (057874), is revoked.

(C.S.D. 82–13)

Subject: Restricted and Prohibited Merchandise: Birds: Feather Hatbands Composed of Feathers From Chinese Ring-Necked Pheasants Are Permitted Entry Into the United States

Date: July 2, 1981
File: RES–2–32 CO:R:E:E
716709 DA

This ruling concerns the importation of feathers from the Chinese ring-necked pheasant bird.

Issue: Whether the feathers of the Chinese ring-necked pheasant are prohibited entry into the United States.

Facts: A feather hatband composed of feathers from a ring-necked pheasant was sought to be imported. Both the Customs import specialist and the Fish and Wildlife inspector determined that the feathers were of the Chinese ring-necked pheasant. Inquiry was made to Headquarters concerning its admissibility.

Law and analysis: Schedule 1, Part 15, Subpart D, Headnote 2(a) of the Tariff Schedules of the United States states that "except as provided in (b) and (c) of this Headnote, the importation of the feathers or skin of any bird is hereby prohibited * * * " Subparagraph (b) of the headnote provides, in part, that the above prohibition "shall not apply—(i) in respect of any of the following birds (other than any such bird which, whether or not raised in captivity, is a wild bird): chickens (including hens and roosters), turkeys, guinea fowl, geese, ducks, pigeons, ostriches, rheas, English ring-necked pheasants, and pea fowl * * *" Other exceptions include importations for scientific or educational purposes; importations of fully manufactured artificial flys used for fishing; live birds; and game birds killed by United States residents and imported for non-commercial purposes. At this point it may be useful to explain what birds are herein involved.

According to Dr. Bernard Grzimek's *Animal Life Encyclopedia*, ring-necked pheasants (*phasianus colchicus*) are the best known and most wide spread wild fowl. They are divided into 34 subspecies, resulting chiefly from geographic isolation:

> 1. Ring-necked pheasant with black necks, originate in North and Transcaucasia, North Iran and Southwestern Transcaucasia * * *
>
> 2. White-winged ring-necked pheasant, with their habitation further East * * *
>
> 3. Kirghiz pheasant, their habitat being steppes from the Aral to Northwest Sinkiang * * *
>
> 4. The Tarim pheasant originates in the river valleys and oases of Central Sinkiang. The feathers of a lower back and the rump are olive green; a white neck ring is lacking.

Dr. Grzimek sets forth two more general categories of subspecies. The last category includes southern green pheasants with the Japanese Islands being their habitat. The fifth category consists of pheasants with their habitat in the larger part of East Asia and includes the Chinese ring-necked pheasants.

The Chinese ring-necked pheasant (*phasianus colchicus torquatus*) was, according to Dr. Grzimek, "imported in England in the eighteenth century and in the European continent in the nineteenth century. It was first introduced in America by Benjamin Franklin's son-in-law in New Jersey. However, the first successful introduction was in Oregon in 1882." This bird "is being hunted so assiduously that it is almost extinct in its Chinese homeland. Fortunately, however, Europe's large pheasantries still are well stocked: The entire pheasant livestock of Europe and North America, therefore, is a

359-831 O - 82 - 7

population hybridized from West Caucasin, Kirghiz, Chinese and Japanese pheasants. If one looks at the colors of pheasant cocks at a game dealer, he will find that no two are alike. The white neck rings may be absent, or they may be faintly indicated, or they may form wide bands. Ring-necked pheasants are also bred for various colors."

Nowhere in Dr. Grzimek's discussion of the subspecies of a ring-necked pheasant is the term "English" ring-necked pheasant used. We have been informally advised by the Fish and Wildlife Service and the Smithsonian Institution that the designation "English" is neither scientific nor taxonomic. When the Chinese ring-necked pheasants were first introduced into the United States, they were imported directly from England, hence the term "English." Not only were the pheasants originally of Chinese origin referred to as English, but eventually the entire ring-necked pheasant livestock of Great Britain became known as "English." Presently, due to the purposeful hybridization described by Dr. Grzimek as well as natural intermingling of stocks both in Europe and America, it is disputable whether the specific Chinese (*torquatus*) subspecies is distinguishable.

We are of the opinion that in enacting Public Law 580 of 1952, Congress probably intended that the term "English" ring-necked pheasant would include Chinese ring-necked pheasants (*phasianus colchicus torquatus*) as well as other subspecies. Hence, all Chinese ring-necked pheasants as well as other subspecies are to be considered as "English ring-necked pheasants" for purposes of this ruling. In support of this position, there are the facts that there is no distinct English subspecies and it is disputable whether any specific subspecies may be ascertained from among the intermingled pheasants. Thus, Chinese ring-necked pheasant feathers are entitled to an exception from the import prohibition in accordance with Schedule 1, Part 15, Subpart D, Headnote 2(b)(i), TSUS, which provides, "in respect to any of the following birds (other than any such bird which, whether or not raised in captivity, is a wild bird): chickens (including hens and roosters), turkeys, guinea fowl, geese, ducks, pigeons, ostriches, rheas, English ring-necked pheasants, and pea fowl."

Schedule 1, Part 5D, Headnote 2, TSUS, also provides for possible quota restrictions for certain other kinds of pheasants. The Fish and Wildlife Service should be contacted regarding whether quota restrictions have been established or reduced for certain pheasants. In addition, the Endangered Species Act may prohibit the importation of certain pheasants that would otherwise meet the requirements of this provision. Currently, 15 species of pheasants are considered endangered. The Fish and Wildlife Service should be contacted in order to ascertain what may be on the list at any particular time.

Holding: Feather hatbands composed of feathers from Chinese

ring-necked pheasants are permitted entry. These particular feathers benefit from the exception to the general prohibition against feathers of birds by falling into the category of English ring-necked pheasant feathers.

Effect on previous rulings: Headquarters Ruling 714109, January 5, 1981, is hereby superseded by this ruling.

(C.S.D. 82-14)

Classification: Rescue Cutters and Spreaders Classifiable Under the Provision for Hand-Directed Tools Suitable for Metal-Working

Date: July 7, 1981
File: CLA-2 CO:R:CV:D
068379 JCH

To: Director, Classification and Value Division, Chicago, Illinois 60607.

From: Director, Classification and Value Division.

Subject: Request for Internal Advice No. 50/81 Concerning the Tariff Classification of (Name) Rescue Equipment (your memorandum of February 23, 1981, MAN-1-02-CV:CH CT 7 WAL).

The subject internal advice request was initiated by counsel for the importer on December 23, 1980. The merchandise is manufactured in West Germany. Our decision follows:

Issue: It is your view that the merchandise in question is classifiable under the provision for hand-directed tools with non-electric self-contained motors suitable for "metal-working" in item 674.60, Tariff Schedules of the United States (TSUS). The column 1 rate of duty required under this provision for merchandise entered on or after January 1, 1981, is 6.8 percent ad valorem. Counsel for the importer contends the merchandise is classifiable under the provision for such tools other than those suitable for metal-working in item 674.70, TSUS. The column 1 rate of duty required under this provision for articles entered on or after January 1, 1981, is 4 percent ad valorem. Accordingly, the principal issue concerns the scope of the term "metal-working" as used in the tariff schedules.

Facts: The equipment comes in sets containing a scissors-type metal cutter operated hydraulically, a pincer-like tool also operated hydraulically and used for spreading metal, squeezing operations or for certain jacking functions, and a gasoline engine-powered pump. This equipment is used to cut and manipulate metal and metal parts to extract victims from automobile or other vehicular accidents.

The cutters are also used for cutting metal cable or tubes. The spreader can be used with a chain for greater versatility in pulling operations. These tools are used by fire departments and rescue squads and have the advantage of producing no sparks which can ignite inflammable materials or cause explosions.

Law and analysis: The thrust of counsel's argument is that the term "metal-working" as used in item 674.60 is limited by the explanation of what is contemplated by the term "machine tool" in Headnote 1(a), Subpart F, Part 4, Schedule 6, TSUS. Therefore, according to counsel, the ripping and tearing function of the merchandise in question excludes it from item 674.60. The cited rule of construction, however, nowhere contains the term "metal-working" and further specifically excludes from its scope merchandise encompassed under item 674.60.

Similarly, the legislative history cited by counsel and the principal legal precedents relied upon, namely *Pitney-Bowes, Inc.* v. *United States*, 59 Cust. Ct. 181, C.D. 3116 (1967), and cases cited therein, deal with what constitutes a machine tool. Hand-directed tools constitute a different category of merchandise which by its nature must be regarded as more varied, versatile and different from articles included under the definition for machine tools for example, certain shaping or milling operations obviously cannot be performed by hand tools, yet these functions are the mainstay of what is performed by machine tools. Accordingly, the concept of what constitutes metal-working in connection with hand tools must be regarded generally as functions different from those regarded as encompassed under the term "metal-working", as used in the machine tool context.

Even in the machine tool context, the authorities cited by counsel demonstrate that what is regarded as metal-working is very broad. We further note that the statistical breakouts in the Tariff Schedules of the United States Annotated specifically include shearing machines under the provision for metal-working machines. By contrast, the list of metal-working operations in the *World Book Encyclopedia* (1975), cited by counsel, include only turning, facing, boring, drilling, milling, planing, broaching, shaping, gear hobbing, extrusion and pressworking. It is our opinion longstanding administrative practice, if not the cited headnote rule of construction, have resulted in a broader scope for tariff classification purposes for the term "metal-working" than recognized by the lexicographic authorities cited by counsel. In these circumstances, we believe that it would be inappropriate to ascribe these limited definitions to the even more comprehensive provisions for hand-directed tools in the tariff schedules.

Apart from specific metal shaping or forming operations, counsel nonetheless claims that a machine tool, and therefore a hand-directed

metal-working tool, is limited for tariff classification purposes to articles which improve or advance the metal or stock worked on. According to counsel, the ripping and tearing results of the instant articles do not fall within the functions of this category of merchandise. It is our view that even if there was legislative intent to impose such a limitation on the provision for machine tools, there is no such intent to so limit the provision for hand tools in item 674.60. Even if the precedents cited to support such a limitation for the machine tool provisions were pertinent to the classification of hand-directed tools, the precedents in question do not revolve entirely around the improved or advanced nature of the articles produced by machine tools. In the *Pitney-Bowes* case, *supra*, for example, one of the competing tariff provisions was in the TSUS subpart covering office machines. In discussing this case, there was the implication in a later decision, *General Methods Corp.* v. *United States*, 65 Cust. Ct. 212, 215, C.D. 4080 (1970), *aff'd* 59 CCPA 109, C.A.D. 1049 (1970), that if the alternative classification had been a basket or similarly less specific provision rather than a "strong competing" provision the result may have been different. Accordingly, counsel's arguments lack the persuasiveness for the placement of the merchandise in question under the "other" provision in item 674.70 than they would have if they were for the purpose of a classification under a provision or part of the TSUS specifically encompassing rescue equipment or even rippping or tearing equipment.

With regard to the concept that an improvement of advancement must ensue from the work done by a machine tool, the court in *United States* v. *Kurt Orban Co.* 47 CCPA 28, C.A.D. 724 (1959), actually based its decision on another theory. That was that the shearing function of the merchandise under litigation was incidental to the main purpose of the equipment, which was to compress scrap metal into bundles. While it is argued that the instant articles are intended to rescue accident victims and not improve or advance metal, people do rescue work, not the machines in question, which are intended to cut or spread metal parts.

Counsel also emphasizes the circumstances in which the articles are marketed and contrasts them to those of the machine tool market. However, the broad scope and essentially descriptive nature of the tariff provision in question, as opposed to tariff descriptions which are essentially *eo nomine* in nature, precludes, in our opinion, disposition of the tariff classification issues in question on a commercial designation theory. Further, counsel suggests that the equipment, due to lighter weight materials now being used in vehicles, may actually be used more on non-metallic parts. Nevertheless, the standard in the tariff provision in question is suitable for use, not chief use.

In summary, while we recognize that there may be some relation of the considerations for placing articles under the machine tool provisions to those for placing articles under the hand-directed tool provisions, the provisions for hand tools are much broader. Looking at the two competing provisions in question, namely items 674.60 and 674.70, in relationship to the other provisions in the subpart in question, we find no legislative intent to make the limitation on the fine points suggested by counsel, but rather find merely an intent to differentiate the two competing provisions on the basis of the material worked on, namely metals as opposed to non-metals.

Holding: The cutters and spreaders in question are classifiable individually under the provision for hand-directed tools suitable for metal-working in item 674.60. Since the hydraulic supply system is designed for use with both of these items and sold as a separate commercial entity in itself, it is separately classifiable as an entirety with its gasoline engine under the provision for pumps in item 660.97, TSUS. The current column 1 rate of duty required under this provision and applicable to articles entered on or after January 1, 1981, is 4.5 percent ad valorem.

Please provide counsel with a copy of this decision.

(C.S.D. 82–15)

Subject: Classification: Enameled Cookwear Featuring Electrofused Gold Rims on the Pots and Lids Are "Gold Plated" for Purposes of Proper Tariff Classification

Date: July 7, 1981
File: CLA–2 CO:R:CV:G
068477 JAS

To: Area Director of Customs, New York Seaport, New York, New York 10048.

From: Director, Classification and Value Division.

Subject: Internal Advice No. 72/81; Classification of Enameled Cookware.

Facts: The merchandise in question, from West Gemarny, consists of casseroles, stockpots, saucepans, baking pans, a tea kettle, a skillet, and a rechaud; all with steel enamel bodies. The lids and tops of the sample casserole (the only sample submitted) have stainless steel rims in ¼ and ⅜ inch widths, respectively, to protect the enamel from chipping. A coating of gold dust is electrofused to the rims. When placed on a pot, the corresponding gold plated rim of the lid is not visible. The enamel is basically cream colored with a floral design decal of green, orange, yellow, and blue. This, together with solid bronze handles and lid top, creates a warm, earth tone.

According to the importer, the rims on the lids and pots are gold plated, rather than bronzed or enameled, because gold, unlike the others, will not wear away, will not oxidize to contaminate the food, and is the nearest match colorwise. Gold is said to represent between 2.4 and 3.6 percent of the total surface area, depending on the piece measured.

Issue: Is the subject merchandise articles, wares, and parts, of base metal, "coated or plated" with gold, classifiable in item 653.75, Tariff Schedules of the United States (TSUS), or not so coated or plated, and classifiable in item 654.02, TSUS?

Law and analysis: It is to be noted that the courts have never established a minimum amount of plating required to warrant classification of an article as "plated or coated." A determination is to be made in accordance with the facts of each particular case. In *Saji and Kariya Co., et al.* v. *United States*, 36 CCPA 222, T.D. 37945 (1919), certain cloisonne vases with metallic lips and either bases or legs plated with gold or silver over about 10 percent of the exterior surface of each vase, were held to be "plated with gold or silver" within the purview of paragraph 167, Tariff Act of 1930. The court found such classification to attach to all metallic articles whose beautiful and artistic appearance is a factor which greatly conduces to their value. Such appearance must be materially enhanced by the plating which ornaments *prominent* and *important* parts of their exposed and visible surface and covers a *substantial* portion of the surface, that is, more than an insignificant or negligible portion.

Lexicographically, "substantial" connotes a qualitative as well as a quantitative standard. As such, while the subject cookware is utilitarian, it is nevertheless decorative and attractive to the eye. The record before us, particularly the one sample and promotional literature submitted, indicates that the metal rims are basic or essential, in view of the non-chipping requirement, and the fact that gold was found to be the only satisfactory plating the rims would accept. Therefore, the gold plates are important parts of the cookware. Moreover, the rims are prominent, in view of their particular location on each piece. In view of the need for maintaining as closely as possible the earth tone color scheme, and noting that without the plating the aesthetic quality of the cookware would be destroyed, it can reasonably be concluded that the gold plating on the metal rims ornaments promenent and important parts of the cookware, over a substantial portion of its surface area.

Holding: The subject cookware is classifiable under the tariff provision for articles used for household, table, kitchen use, coated or plated with gold, in item 653.75,TSUS, dutiable at the rate of 17.1 percent ad valorem.

(C.S.D. 82–16)

Subject: Trademarks: U.S. Customs Officers May Prohibit the Importation of and May Seize Any Article Bearing a Counterfeit Trademark Which Is Imported Into a Foreign Trade Zone Within the United States.

Date: July 9, 1981
File: TMK–3–CO:R:E:E
716202 SO

This ruling concerns whether Customs Service officers have the authority to seize merchandise bearing a counterfeit trademark within a foreign trade zone.

Issue; The issue is whether or not Officers of the United States Customs Service have the authority to prohibit the entry into a foreign trade zone and to seize merchandise within a foreign trade zone bearing a mark which is a counterfeit of the registered trademark of a foreign owner which has been recorded with the Customs Service

Facts: The United States licensee of a foreign trademark owner has reason to believe that an attempt may be made to bring certain wearing apparel bearing a counterfeit trademark into a foreign trade zone. The attorney for the licensee feels that the illicit shipment of foreign merchandise with counterfeit marks into a foreign trade zone circumvents the trademark laws of the United States to the detriment of trademark holders, and is seeking a ruling which holds that said merchandise may be prohibited from being imported and placed in a foreign trade zone.

Law and analysis: Section 42 of the Act of July 5, 1946 (commonly referred to as the Lanham Act, 60 Stat. 440, 15 U.S.C. 1124) prohibits the importation into the United States of merchandise which shall copy or simulate a registered trademark of any foreign manfacturer or trader who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to advantages afforded by law to citizens of the United States in respect to trademarks, provided, a copy of such trademark registration is filed with the Secretary of the Treasury in the manner provided by regulations (19 CFR 133.1–133.7).

Section 526(e) of the Tariff Act of 1930, as amended, (19 U.S.C. 1526(e)) provides that any such merchandise bearing a counterfeit mark, within the meaning of section 45 of the Lanham Act (15 U.S.C. 1124), shall be seized and, in the absence of written consent of the trademark owner, forfeited for violation of the Customs Laws. The term "counterfeit" is defined in the law (15 U.S.C. 1127) as a spurious mark which is identical with or substantially indistinguishable from, a registered mark.

In the case of *American Customs Brokerage Co., Inc.* v. *United States A/C Astral Corp.* (C.D. 4546), decided May 30, 1974, it was held that unless it clearly appears that Congress intended otherwise, the term "importation" has been held to mean the bringing of goods within the jurisdictional limits of the United States with intent to unlade. Merchandise of every description, including over quota merchandise, may be brought into a zone unless prohibited by law (19 CFR 146.11). The United States District Court, S.D. New York, in the case of *A. T. Cross Co.* v. *Sunil Trading Corp.*, 467 F. Supp. 47 (1979) held that the jurisdictional parameters of the Lanham Act reach within the foreign trade zone. Foreign goods entering a foreign trade zone are considered to be physically imported into the United States. However, they are not subject to import duties while they remain in a foreign trade zone, provided they are finally exported to a foreign port. It is clear, therefore, that Customs officials have jurisdiction within a foreign trade zone, to enforce the trademark restrictions of the Lanham Act whenever violations are discovered.

Holding: Customs officers may prohibit the importation of any article into a foreign trade zone within the United States bearing a "counterfeit" trademark and may seize such articles discovered within a zone. Pursuant to 19 CFR 133.23a(c), the trademark owner is notified of the seizure and the quantity of articles seized. Unless the trademark owner, within 30 days of notification, provides Customs with written consent to the importation of the articles, exportation, entry after obliteration of the trademark, or other appropriate disposition, the infringing articles bearing a "counterfeit" trademark shall be disposed of in accordance with 19 CFR 133.52(c).

(C.S.D. 82–17)

Subject: Classification: A Synthetic Raffia on the Vamp of a Woman's Casual Shoe Is Considered a Plastic Material for Purposes of Tariff Classification

Date: July 14, 1981
File: CLA–2–07:S:C:D6:66–401 800869

In a letter dated June 3, 1981, you inquired as to the dutiable status of a women's casual shoe, your item number 1844 and 1876, produced in Taiwan. Both item numbers appear to be the same style as one sample was submitted.

The sample is a women's open-toe, open-back casual shoe consisting of a vinyl ankle-strap, a vamp trimmed in vinyl with a surface com-

posed of interwoven strips of synthetic material (a synthetic raffia), a medium wedge scooped heel and a rubber/plastic outsole.

The major issue raised is whether the synthetic raffia on the vamp is considered a plastic material as claimed. Laboratory analysis has determined that the white folded strips would be considered a plastic material, but that the rigid black and ecru strips are "man-made" fibers as defined in Headnotes 2 and 3 of Subpart E, Part 1, Schedule 3, Tariff Schedules of the United States. Laboratory analysis has also determined that the exterior surface area of the upper is less than 90 percent plastics.

Your shoe is classifiable under the provision for footwear which is over 50 percent by weight of rubber or plastics, having uppers of which not over 90 percent of the exterior surface area is rubber or plastics, other than protective footwear provided for in items 700.51, 700.52, 700.53, and 700.57, and other than footwear having uppers of which over 50 percent of the exterior surface area is leather; footwear with open toes or open heels (except footwear having foxing or a foxing-like band wholly or almost wholly of rubber or plastics applied or molded at the sole and overlapping the upper) in item 700.59, Tariff Schedules of the United States, and dutiable at the rate of 37.5 percent.

This ruling is being issued under the provisions of Section 177.1(a)(1) of the Customs Regulations (19 CFR 177.1(a)(1)).

(C.S.D. 82–18)

Subject: Classification: Tariff Classification of Footwear, Textile and Nontextile Footwear Components and Machinery Used in the manufacture of Footwear

Date: July 16, 1981
File: CLA–2–7:S:C:D6:61–289
800650

Your letter of April 8, 1981 requested this office to rule upon the tariff classification of footwear, nontextile footwear components, textile footwear components and machinery from Taiwan.

(A) Regarding the shoe components, we first consider the tariff situation if all components of either of the samples are imported into the U.S. on the same day at the same port.

(1) Sample "A" has the two main parts of a jogger, the unlasted, flat upper and the fused bottom unit of rubber and plastic (rubber outsole, foamed plastic midsole and wedge). The only significant piece which is missing is the cardboard insole. Sample A is classifiable as footwear in the Tariff Schedules of the United States,

Schedule 7, Part 1, Subpart A. TSUS General Headnote 10(h) provides that unassembled items and unfinished (in this case, incomplete) items are to be classified as if they were assembled and finished. Since the only significant piece needed to assemble a complete shoe is the cardboard insole, which is a relatively small percent of the cost of the materials, we consider Sample A to be incomplete, unassembled footwear by the simultaneous application of the "unassembled" and "unfinished" terminology of Headnote 10(h). Within footwear, this cemented jogger with a nylon upper with flocked vinyl and smooth vinyl overlays will be classified as footwear which is over 50% by weight of rubber and plastic; has less than 90% rubber and/or plastic surface on the exterior surface area of the upper; is not protective against water, oil, grease, or cold or inclement weather; had neither open toes nor open heels; is not a slip-on; has soles and midsoles of rubber and/or plastic which are affixed to the upper and to each other exclusively by an adhesive; does not have a foxing-like band; and does not have soles which overlap the upper except at the toe in item 700.61, TSUS, dutiable at 37.5% assuming it is valued not over $6.50 per pair and assuming that it will be exported on or after July 1, 1981 and that the changes in footwear classification scheduled for that date become effective as provided by Public Law 96–39 (July 26, 1979).

(2) Sample "B" has almost all the separate pieces of a shoe, requiring only stitching, cementing and occasional, minor cutting to produce finished footwear. This is, thus, squarely in the provision for unassembled footwear. As footwear, it will be classified as footwear which, when assembled and finished, has over 50% leather surface on the exterior surface area and is, we presume, in chief value of the rubber and/or plastic components, in item 700.95, TSUS, dutiable at 12.5 percent. Items exported from Taiwan, which are classified in TSUS 700.95, may be subject to import restraints such as quotas or visa requirements based upon international footwear trade agreements. If you desire further information in this regard, we suggest that you write directly to our Duty Assessment Division, Headquarters, U.S. Customs Service, 1301 Constitution Ave., N.W., Washington, D.C. 20229. Please enclose a copy of this ruling and a sample of the merchandise with your inquiry.

(B) We next consider the tariff situation if the components are imported separately.

1. The bottoms of both Sample A and Sample B are classified in item 774.50, TSUS, dutiable at 8.5%, if they are in chief value of the non-expanded, synthetic rubber of the outsole

and are classified in item 770.80, TSUS, dutiable at 11%, if they are in chief value of the expanded plastic midsole and wedge.

2. The 3 cut pieces of leather included in Sample B are classified in item 791.28, dutiable at 5% as articles of leather which are shoe components.

3. The nylon quarters and tongue, all with a foam padded tricot lining, in Sample B are classified in item 389.62, TSUS, dutiable at $.25 per pound plus 15% as articles of nylon not specially provided for, which are not ornamented, lace, net, knit or pile.

4. The completed nylon upper in Sample A with flocked vinyl and smooth vinyl overlays is also probably classified in item 386.07, dutiable at 25%, as ornamented shoe uppers which are neither of cotton nor of wool. Since the ornamental vinyl side flashes will be disregarded in computing the material of chief value of the upper [due to TSUS, Schedule 3, Headnote 3(c)] and only the cost of the cotton drill backing will be included in that computation among the costs of the flocked vinyl overlays [due to the exclusion contained in TSUS, Schedule 3, Headnote 4(b) applied both to the vinyl coating and to the fabric flocking coating the vinyl], the upper is probably in chief value of the nylon. However, a detailed component breakdown is necessary before a definite classification can be given.

5. With regard to Sections (B) (1) and (2) above, note that articles classified in items 774.50, 770.80 and 791.28, TSUS, which are the products of Taiwan are presently entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

6. With regard to Sections (B) (3) and (4) above, articles classified in items 389.62 and 386.07, TSUS, may be subject to import restraints such as quotas or visa requirements based upon international textile trade agreements. If you desire further information in this regard, we suggest that you write directly to our Duty Assessment Division, Headquarters, U.S. Customs Service, 1301 Constitution Ave., N.W., Washington, D.C. 20229. Please enclose a copy of this ruling and a sample of the merchandise with your inquiry.

(C) As our last section, we reply to your questions regarding machinery. In the absence of descriptive literature or other information indicating the function and operation of the machines you list, a definite classification ruling cannot be issued. If the machines are of a class or kind solely or chiefly used in the manufacture of foot-

wear, they would be classifiable in the provision for shoe machinery in item 678.10, TSUS, and free of duty.

To conclude, this is a ruling letter issued under the provisions of Section 177.1(a)(1) of the Customs Regulations (19 CFR 177.1) in regard to (A)(1), (B)(1), (B)(2), and (B)(3); and, to the extent that additional information is needed as indicated above, an information letter, issued under the provisions of Section 177.1(d)(2) of the Customs Regulations (19 CFR 177.1) in regard to the balance.

(C.S.D. 82–19)

Subject: Classification: A Plastic Imitation Welt on a Woman's Casual Shoe Is Not a Fox-Like Band nor Does the Stitching in It Serve To Attach the Welt to the Upper or the Sole

Date: July 27, 1981
File: CLA–2–07:S:C:D6:61–405
800896

In a letter dated June 17, 1981, you inquired as to the dutiable status of a women's casual shoe manufactured in Taiwan, to be exported after July 1, 1981.

Your sample is a women's closed-toe, closed-back, five-eyelet tie, casual shoe consisting of a vinyl upper with fabric overlays covering more than ten percent of the exterior surface area of the upper on the vamp, a plastic imitation welt, and a rubber/plastic outsole. You state that the price of the shoe is $4.50 per pair, FOB, Taiwan. The shoe is of cement construction. The plastic imitation welt is not considered by Customs to be a foxing or foxing-like band, and the stitching in it does not serve to attach it to the upper or the sole.

The stitch only goes through the welt strip itself. However, the welt strip is joined to the sole (by cement) and the top of the welt strip is about one eighth of an inch higher than the point where the upper makes the turn to be joined to the top of the sole, horizontal surface to horizontal surface. The joint between the upper and the balance of the sole is therefore hidden by the "welt strip".

Your sample is classified as footwear; which is over 50% by weight of rubber and plastic; in which leather covers less than 50% of the exterior surface area of the upper and rubber and plastic cover less than 90%; which is not protective against water, oil, grease, or cold or inclement weather; which has neither open toes nor open heels and is not of the slip-on type; *which has soles which overlap the upper other than at the toe or heel;* and which is valued for Customs purposes over $3.00

359-831 O - 82 - 8

but not over $6.50 per pair, in item 700.67, TSUS, and dutiable at the rate of 37.5 percent plus $.90 per pair.

This ruling is being issued under the provisions of Section 177.1(a)(1) of the Customs Regulations (19 CFR 177.1(a)(1)).

(C.S.D. 82-20)

Subject: Instruments of International Traffic: Designation of Drums and Cylinders as Instruments of International Traffic Within the Meaning of Section 10.4a, Customs Regulations

Date: August 4, 1981
File: BOR-7-07-CO:R:CD:C
105164 HS

This ruling concerns the classification of certain cylinders and drums as instruments of international traffic.

Issue: Whether the cylinders and drums used by (corporate name) to transport boron trichloride and boron tribromide are classifiable as instruments of international traffic within the meaning of section 10.41a, Customs Regulations.

Facts: Boron trichloride and boron tribromide are exported by (corporate name) in returnable cylinders and drums to Europe and the Far East. It is anticipated that the drums and cylinders returning from Europe will enter the United States through the ports of New York or New Jersey and that the drums and cylinders returning from the Far East will enter through the Los Angeles-Long Beach port. During 1980 approximately 50 drums and cylinders were shipped overseas.

The boron tribromide will be carried in 10 gallon monel drums. The body bottom, top chimes and closures of the drums are constructed of 14 gauge monel. Footrings are made of mild steel which is zinc-coated. Both closures in the top head are secured by monel plugs with solid teflon gaskets. Each drum has a diameter of 16 inches, is 18½ inches high and has a tare weight of 54 pounds.

The boron trichloride will be carried in three different size cylinders. The small cylinders measure 10¼ inches in diameter, are 40 inches high, have a water capacity of 96 pounds, a net weight of 100 pounds and a tare weight of 50 pounds. The intermediate size cylinders measure 29½ inches in diameter, are 56¾ inches high, have a water capacity of 1,000 pounds, a net weight of 1,200 pounds and a tare weight of 318 pounds. The large cylinders measure 30½ inches in diameter, are 80¾ inches high, have a water capacity of 1,600 pounds, a net weight of 1,800 pounds and a tare weight of 1,341 pounds. All the cylinders are constructed of steel.

All drums and cylinders are permanently embossed with the proper United States specification numbers. The drums will be marked "DOT 5M–225". The small cylinders will be marked "DOT 4B–225", "DOT 4BA–225" or "DOT 4BW–225". The intermediate size cylinders will be marked "DOT 4BA–240" or "DOT 4BW–240" and the large cylinders will be marked "DOT–27". The utilization of normal maintenance practice should provide an average service life of 20 years for the drums and cylinders.

Law and analysis: To qualify as "an instrument of international traffic," within the meaning of title 19, United States Code, section 1322(a), an article must be used as a container or holder, must be substantial, must be suitable for and capable of reuse, and must be used in significant numbers in international traffic.

Pursuant to Treasury Decision 74–178, stainless steel drums used for the transportation of various chemicals were designated as instruments of international traffic which could be released under the procedures set forth in section 10.41a, Customs Regulations.

Pursuant to Treasury Decision 73–290, four types of steel cylinders ranging in size from approximately 30 to 45 inches in height, approximately 24 to 55 inches in length and approximately 8 to 29 inches in diameter used for the transportation of various chemicals were designated as instruments of international traffic which could be released under the procedures set forth in section 10.41a, Customs Regulations.

Holdings: The 10 gallon monel drums marked "DOT 5M–225" in which the boron tribromide will be carried are similar to the articles described in Treasury Decision 74–178 and are designated as instruments of international traffic. The cylinders marked "DOT 4B–225," "DOT 4BA–225," "DOT 4BW–225," "DOT 4BA–240," "DOT 4BW–240," or "DOT 27" in which the boron trichloride will be carried are similar to the articles described in Treasury Decision 73–290 and are designated as instruments of international traffic. Both the drums and cylinders may be released under the procedures set forth in section 10.41a, Customs Regulations.

U.S. Customs Service

General Notice

(19 CFR Part 10)

Generalized System of Preferences—Evidence of the Country of Origin

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: For all shipments of imported merchandise valued in excess of $250, a claim for an exemption from duty under the Generalized System of Preferences ("GSP"), must be supported by the production of a GSP Certificate of Origin Form A.

This document proposes to amend the Customs Regulations by giving the district directors of Customs discretion to waive production of the Form A as evidence of the country of origin in all cases when the district director is satisfied that the articles qualify for duty-free entry under GSP. This amendment would remove the burden on importers of acquiring a Form A from foreign governments when, through no fault of the importer, one cannot be obtained and the merchandise qualifies for duty-free treatment in all other aspects.

DATE: Comments must be received on or before (60 days from the date of publication in the Federal Register).

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Benjamin Mahoney, Entry Procedures and Penalties Division (202–566–5765); Operational Aspects: Fred McGreevy, Duty Assessment Division (202–566–2957).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title V of the Trade Act of 1974 (19 U.S.C. 2461-2465) (the "Trade Act"), authorizes the President to establish a Generalized System of Preferences (GSP) to provide duty-free entry for eligible articles arriving directly from designated "beneficiary developing countries." Section 503(b) of the Trade Act (19 U.S.C. 2463(b)), relating to the requirements which must be met for eligible articles to receive duty-free treatment, authorizes the Secretary of the Treasury to prescribe such regulations as may be necessary to carry out the provisions of that subsection.

Sections 10.171 through 10.178, Customs Regulations (19 CFR 10.171–10.178), set forth the requirements and procedures for the entry of eligible merchandise from "beneficiary developing countries" under GSP. Section 10.173(a), Customs Regulations, requires that except as provided in paragraph (a)(5) of that section, the importer or consignee of a shipment of eligible merchandise, valued in excess of $250, claiming duty-free treatment under GSP shall file with the district director in connection with the entry a Form A, as evidence of the country of origin. Paragraph (a)(2) permits the district director to accept a duplicate Form A in the event of loss, theft, or destruction of the original certificate. Further, paragraph (a)(3) permits the district director to accept the entry and release the merchandise under bond where the Form A, or a duplicate, is unavailable at the time of entry. Under this procedure, the importer has 60 days from the date of entry, or such additional period of time as the district director may allow, to file the Form A with Customs and still obtain duty-free treatment. If the Form A is not delivered, the district director would treat the entry as dutiable and could cancel the bond or the charge against the bond, as he deems appropriate. Section 10.173(a)(5)(i) provides that the district director may waive the production of a Form A *only* in the case of articles for personal or household use which are not intended for resale or brought in for the account of others, when the district director is otherwise satisfied that the merchandise qualifies for duty-free entry under GSP. Section 10.173(a)(5)(ii) provides that until March 31, 1976, the district director may waive production of a Certificate of Origin when he is otherwise satisfied that the merchandise qualifies for duty-free entry under the Generalized System of Preferences.

This document proposes to amend section 10.173(a) to give the district director the discretion to waive production of the Form A for *all* entries of merchandise, regardless of value, when he is satisfied that the merchandise qualifies for duty-free entry under GSP. The

proposed change would remove the regulatory burden on importers of acquiring a Form A from foreign governments when, through no fault of their own, one cannot be obtained, and the merchandise qualifies for duty-free treatment in all other aspects. This would be of benefit to the importing public in that a significant amount of money spent in communicating back and forth between the United States and foreign countries would be saved. This proposed amendment also would benefit Customs by eliminating the need for withholding appraisement on relatively insignificant shipments; the considerable time spent in the process of filing GSP entries; the charging of bonds for missing documents (namely the Form A); and in the follow-up process relating to the production of the missing documents.

It also is proposed to delete section 10.173(a)(5)(ii) which is no longer needed.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, U.S. Customs Service, Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

PROPOSED AMENDMENT

It is proposed to revise 10.173(a)(5), Customs Regulations (19 CFR 10.173(a)(5)), to read as follows:

10.173 Evidence of the Country of Origin.

(a) *Shipments valued in excess of $250.*

* * * * * * *

(5) *Waiver of Certificate of Origin.*

The district director may waive production of a Certificate of Origin when he is otherwise satisfied that the merchandise qualifies for duty-free entry under the Generalized System of Preferences.

AUTHORITY

This amendment is proposed under the authority of R.S. 251, as amended, sections 304, 624, 46 Stat. 759, section 503(b), 88 Stat. 2069 (19 U.S.C. 66, 1624, 2463(b)).

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of section 3 of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601, *et seq.*), the Secretary of the Treasury has determined that if promulgated, the regulation set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, this regulation is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

The proposed amendment would remove a regulatory burden on the part of importers. The economic impact, if any, on a number of small entities would be an economic benefit in that a significant amount of money would be saved by the importer in communicating between the U.S. and the foreign country to obtain the certificate. Further, an additional benefit would inure to the importer in that there would be a substantial economic gain derived from the time saved in the proc essing of entries where a Form A is missing.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Barbara E. Whiting, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

A. R. De Angelus,
Acting Commissioner of Customs.

Approved: December 15, 1981.

John M. Walker, Jr.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, Jan. 14, 1982 (47 FR 2124)]

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19 CFR Part 18

Proposed Customs Regulations Amendments Relating to Entry of Merchandise Transported In-Bond

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: Upon arrival of imported merchandise transported in-bond at the port of destination, the delivering carrier is required to promptly furnish Customs appropriate documentation as a notice of arrival of the merchandise. Thus, Customs can inspect and appraise the merchandise and collect duty, if applicable.

If there is a shortage of one or more packages or nondelivery of an entire shipment and an inquiry by the carrier discloses that the merchandise has been delivered directly to the consignee, entry may be accepted by Customs if the merchandise is recovered intact without any of the packages having been opened. However, if the merchandise cannot be recovered intact, entry cannot be accepted. As a result of not accepting entry, no trade statistics are collected on the merchandise. Effective administration by Customs of quotas, orderly marketing agreements, and import monitoring may be jeopardized as well as trade data used for international trade negotiations. Accordingly, this document proposes to amend the Customs Regulations to authorize acceptance of an entry of the merchandise even though the merchandise cannot be recovered intact.

DATE: Comments must be received on or before (60 days from the date of publication in the Federal Register).

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: William Marchi, Duty Assessment Division (202–566–2957); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under sections 552 and 553, Tariff Act of 1930 (19 U.S.C. 1552, 1553), any merchandise, other than explosives and merchandise the importation of which is prohibited, arriving at a port of entry in the United States, may be entered without appraisement or payment of Customs duty for: (1) transportation in-bond to any other port of entry; or (2) transportation in-bond through the United States for exportation. Either transportation must be made under regulations prescribed by the Secretary of the Treasury, most of which are set forth in Part 18, Customs Regulations (19 CFR Part 18).

Under section 18.2(d), Customs Regulations (19 CFR 18.2(d)), upon arrival of the merchandise at the port of destination, the delivering carrier is required to promptly furnish Customs with the in-bond

manifest and other appropriate documentation as a notice of arrival of the merchandise. Thus, Customs can inspect and appraise the merchandise and collect duty, if applicable.

Section 18.6, Customs Regulations (19 CFR 18.6), sets forth the procedures to be used at the port of destination in the event of nondelivery to Customs of an entire shipment or if there is a shortage of one or more packages in a shipment.

Under section 18.6(b), Customs Regulations, if there is a shortage of one or more packages or nondelivery of an entire shipment and an inquiry by the carrier discloses that the merchandise has been delivered directly to the consignee, entry may be accepted by Customs if the merchandise is recovered intact without any of the packages having been opened.

However, under section 18.6(c), Customs Regulations, if the merchandise cannot be recovered intact, under the circumstances specified in section 18.6(b), entry cannot be accepted. In that event, a demand for liquidated damages under the bond is sent to the initial bonded carrier. As a result of not accepting entry, no trade statistics are collected on the merchandise.

It is believed that the reason for not accepting entry, which has been adhered to since 1936, is that Customs officers could not appraise what they could not see. In addition, it was believed that the penalties assessed against the carrier as liquidated damages under its bond would deter the carrier from violating the regulations. However, Customs has found that the penalties are no longer a deterrent and that vital import statistics are not being collected.

Pub. L. 95–410, the "Customs Procedural Reform and Simplification Act of 1978," made numerous changes in laws administered by Customs relating to the entry of imported merchandise. Section 102 of Pub. L. 95–410 amended 19 U.S.C. 1484(a) by providing that entry shall be made by filing the documentation necessary to enable Customs to determine whether the merchandise may be released from Customs custody. Section 102 also provided that documentation necessary to classify and appraise merchandise and to verify statistical information shall be filed at the time prescribed by regulation. Furthermore, that section provided for the issuance of regulations to ensure the accuracy and timeliness of statistics under the new entry procedures, particularly statistics with regard to the classification and value of imports.

However, under the circumstances set forth in section 18.6(c), if no entry is made, no trade statistics are being collected. Effective administration by Customs of quotas, orderly marketing agreements, and import monitoring may be jeopardized as well as trade data used for international trade negotiations.

Therefore, this document proposes to amend section 18.6(c) to auth-

orize acceptance of an entry of merchandise even though the merchandise cannot be recovered intact. In accordance with section 141.4, Custom Regulations, an entry is required for imported merchandise, unless such entry requirement is specifically exempt by law or regulations. The net effect of this proposal would be to require the filing of an entry for merchandise which cannot be recovered intact. A demand for liquidated damages under the bond would still be sent to the initial bonded carrier.

AUTHORITY

This amendment is proposed under the authority of R.S. 251, as amended (19 U.S.C. 66), sections 484, 552, 553, 624, 46 Stat. 722, as amended, 742 as amended, 579 (19 U.S.C. 1484, 1552, 1553, 1624).

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.8(b), Customs Regulations (19 CFR 103.8(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

E.O. 12291

The proposed amendments do not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared for this regulatory project.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of section 3 of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601, *et seq.*), the Secretary of the Treasury has determined that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, these regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Charles D. Ressin, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

PROPOSED AMENDMENTS

It is proposed to amend section 18.6(c), Customs Regulations (19 CFR 18.6(c)), by revising it to read as follows:

PART 18—TRANSPORTATION IN-BOND AND MERCHANDISE IN TRANSIT

18.6 Short shipments; shortages; entry and allowance. * * *

(c) If the merchandise cannot be recovered intact, as specified above, entry may be accepted for the full manifested quantity unless a lesser amount is otherwise permitted in accordance with Subpart A of Part 158. Except as provided in paragraph (d) of this section, there shall be sent to the initial bonded carrier a demand for liquidated damages on Customs Form 5955–A, in the case of nondelivery of an entire shipment or on Customs Form 5931, in the case of a partial shortage.

* * * * * * *

GEORGE C. CORCORAN, JR.,
Acting Commissioner of Customs.

Approved: December 15, 1981.

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, Jan. 14, 1982 (47 FR 2125)]

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19 CFR Part 111

Proposed Amendments to the Customs Regulations Relating to Customhouse Broker Licenses

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations relating to the licensing procedure for customhouse brokers to eliminate the requirement that Customs conduct another investigation each time a broker, previously licensed to transact business (after investigation) in one or more Customs districts, applies for a license in an additional district. This action is proposed to reduce delays in processing broker applications and costs to both brokers and Customs.

DATES: Comments must be received on or before (60 days after publication in the Federal Register).

ADDRESS: Comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control

Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2426, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: James F. Bartley, Entry Procedures and Penalties Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

A customhouse broker ("broker") is a person who is licensed by the Customs Service ("Customs") to transact Customs business on behalf of importers and other persons. The regulations governing the licensing of brokers, and their duties and responsibilities, are found in Part 111, Customs Regulations (19 CFR Part 111).

Under section 111.19, Customs Regulations (19 CFR 111.19), a broker's license authorizes the transaction of Customs business only in the district for which issued. If a licensed broker desires to obtain a license for an additional district, an application must be filed with the district director of the district for which a license is desired, and Customs conducts an investigation to determine if the applicant is prepared and qualified to furnish efficient service in the additional district.

The requirement for another investigation of an applicant desiring to obtain a license for an additional district delays the processing of the application. Furthermore, Customs incurs the additional expense of conducting an investigation each time a broker applies for a license in a new district.

It has been determined that instead of another investigation each time a broker applies for a license in an additional district, the district director of the district where the application is filed immediately could notify the district director of the district in which the applicant is licensed and request his comments as to the applicant's qualifications in providing efficient service to importers and in complying with the duties and responsibilities of a broker. The district director in the district in which the applicant is licensed would submit his comments and recommendations timely to the district director making the request. The district director of the district where the application is filed then would forward the recommendations of the other district director, his recommendations for action on the application, and the application to Customs Headquarters for a determination as to whether to issue the license in the new district.

This change in procedure would expedite the processing of applications for a license in additional districts, and thus eliminate the

cost to the applicant of maintaining qualified employees and an office in the new district pending action on his application to be licensed in that district. In addition, Customs would save the costs of conducting what usually is found to be an unnecessary investigation. However, if any information is developed which raise any question as to the fitness of the applicant, the Commissioner would be authorized to require that an investigation be conducted.

Accordingly, it is proposed to amend Part 111, Customs Regulations, to eliminate the re-investigation requirement for brokers who apply for a license in more than one district.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend Part 111, Customs Regulations (19 CFR Part 111), in the following manner:

Part 111—Customhouse Brokers

1. Section 111.14(a), Customs Regulations (19 CFR 111.14(a)), would be revised to read as follows:

111.14 Investigation of the applicant.

(a) *Individual license.* If the applicant passes the examination, the district director shall refer the application to the special agent in charge for an investigation and report.

* * * * * * *

2. Section 111.14(b), Customs Regulations (19 CFR 111.14(b)), would be revised to read as follows:

111.14 Investigation of the applicant.* * *

(b) *Partnership, association, or corporation license.* The district director shall immediately refer an initial application for a partnership, association, or corporation license to the special agent in charge for investigation and report.

3. Section 111.19(c), Customs Regulations (19 CFR 111.19(c)), would be amended by removing the words "upon investigation" from the first sentence of that section.

4. Add new paragraphs (d) and (e) to section 111.19. Customs Regulations (19 CFR 111.19), to read as follows:

111.19 Licenses for additional districts.* * *

(d) *Recommendation and return of the application by the district director.* Upon receipt of the application, the district director shall immediately notify the district director(s) in the other district(s) in which the applicant is licensed and request comments as to the applicant's qualifications in rendering valuable service to importers and as to the applicant's compliance with the duties and responsibilities of a broker in the other district(s). The district director in the other district(s) shall timely submit his comments

and recommendation(s) to the district director making the request(s). The district director for the district where the application is made shall forward the recommendations of other district director(s), his recommendations for action on the application, and originals of the application to the Commissioner. The district director's recommendations of approval or disapproval of the application shall indicate if an individual applicant resides or has an established office in the additional district or, in the case of a partnership, association, or corporation application, if the requirements of sections 111.11 (b) or (c) have been met.

(e) *Investigation.* The Commissioner may require an investigation to be conducted if additional facts are deemed necessary to pass upon the application.

AUTHORITY

These amendments are proposed under the authority of R.S. 251, as amended, sections 624, 641, 46 Stat. 759, as amended (19 U.S.C. 66, 1624, 1641).

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

Because this document will not result in a regulation which wouly be a "major" rule as defined by section 1(b) of E.O. 12291, a regulatory impact analysis and review as prescribed by section 3 of the E.O. ie not required.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this proposal because the proposed amendments will not have a significant economic impact on a substantial number of small entities. The proposed amendments merely involve a procedural change in the Customs Regulation intended to expedite the processing of broker applications for licenses in additional districts. The only discernible economic impact would be to lessen the cost of the process for brokers and Customs. In addition, the proposal is not expected to have significant secondary or incidental effects on a substantial number of small entities or impose, or otherwise cause, a significant

increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Accordingly, the Secretary of the Treasury certifies under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the proposed amendments will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was Todd J. Schneider, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

Approved: December 30, 1981.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, Jan. 13, 1982 (47 FR 1396)]

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19 CFR Part 177

Tariff Classification: Garments With Simulated Features

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed change of practice.

SUMMARY: This document gives notice that the Customs Service is reviewing its current uniform and established practice of classifying certain garments with simulated features as not ornamented wearing apparel. To assist in the review, public comments are invited as to whether Customs should change its practice and consider such simulated features as ornamentation for tariff purposes.

DATE: Comments (preferably in triplicate) must be received on or before: (60 days from the date of publication of this notice in the Federal Register).

ADDRESS: Comments should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Philip Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

In classifying imported wearing apparel for Customs purposes, the question often arises whether or not such apparel is ornamented or not ornamented. Generally, ornamented wearing apparel is subject to a higher rate of duty than not ornamented wearing apparel.

Under an existing uniform and established practice Customs has classified certain garments with simulated features as not ornamented if those simulated features (1) simulate functional features normally found on the subject garment; (2) are located where those functional features would usually be found; and (3) are no more decorative than the functional features they simulate.

The tariff classification of ornamented and not ornamented wearing apparel was the subject of a recent notice published in the Federal Register on August 21, 1981 (T.D. 81–214, 46 FR 42446). In that notice Customs discussed, at some length, the applicability of the decision of the U.S. Court of Customs and Patent Appeals in *The Ferriswheel* v. *United States*, C.A.D. 1260, to the classification of certain garments, not including garments with simulated features. At this time, and in view of the principles expressed in the *Ferriswheel* decision, and in prior judicial decisions. (*e.g.*, *Blairmoor* v. *United States*, 60 Cust. Ct. 388, C.D. 3396 (1968); *Colonial Corp.* v. *United States*, 62 Cust. Ct. 502, C.D. 3815 (1969)), Customs believes its practice with respect to the classification of garments with simulated features is in error.

The court held in *Ferriswheel* that garments having clearly ornamental features are not classifiable as not ornamented solely because the ornamentation is necessary to make those garments authentic. In the case of simulated features, those simulations have no functional capability, even though they may be appropriate to the garment and serve to visually enhance the appearance of the garment, Following the reasoning in *Ferriswheel*, and other judicial precedents, because a simulated feature adds to the visual effect of a garment or article, that garment or article must be judged by the same standards as other garments or articles (i.e., whether the simulation is primarily functional or primarily decorative).

PROPOSED CHANGE OF PRACTICE

In view of the above, Customs believes that simulations on wearing, apparel such as false pocket flaps, simulated belts or belt segments, simulated pocket openings, and simulated garment openings, among other simulations, if primarily decorative, should constitute ornamentation for tariff classification purposes.

Accordingly, comments are invited as to whether Customs should change its practice and consider such simulated features as ornamentation for tariff purposes.

AUTHORITY

Inasmuch as the proposed change of practice would affect the assessed duties on garments subject of such change, Customs is giving this notice and opportunity for comment in accordance with section 315 (d), Tariff Act of 1930, as amended (19 U.S.C. 1315 (d)), and section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Consideration will be given to any written comments submitted in writing to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business hours at the Regulations Control Branch, Headquarters, Room 2426, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this notice was Robert Joseph Pisani, Regulations Control Branch, U.S. Customs Service. However, personnel from other offices within Customs participated in its development.

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

Dated: December 28, 1981.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, Jan. 14, 1982 (47 F.R. 2126)]

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 81–119)

ATLANTIC SUGAR, LTD., AND REDPATH SUGARS, LTD., PLAINTIFFS v. UNITED STATES, DEFENDANT

AMSTAR CORPORATION, PARTY-IN-INTEREST

Court No. 80–5–00754

Memorandum and Order

Rogers & Wells (*Robert V. McIntyre* and *George C. Smith* on the brief) for the plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Francis J. Sailer* on the brief), for the defendant. *Sullivan & Cromwell* and *Baker & McKenzie* for the Party-in-Interest.

WATSON, *Judge:* Plaintiffs, Atlantic Sugar, Ltd. and Redpath Sugars, Ltd., brought this action under section 516A(a)(2) of the Tariff Act of 1930 (19 U.S.C. 1516a(a)(2)) to challenge a final determination made by the International Trade Commission (ITC) in an antidumping investigation. The International Trade Commission found that importations of refined sugar from Canada, which were being sold at less than their fair value at the end of 1978 and the beginning of 1979, were causing material injury to an industry in the United States. [1]

The parties cross-moved for judgment on the administrative record under Rule 56.1 of the Rules of this Court. Following the discovery of miscalculations in the data underlying some of the ITC findings this Court remanded the matter to the ITC for reconsideration.[2] This resulted again in a determination of injury [3] which is now before the Court for review.

The review centers on two issues, whether the ITC was correct in finding that a regional sugar industry existed and whether it was correct in finding material injury within the meaning of the law. This decision may therefore be divided into two distinct sections.

I

For the purposes of the determination, the ITC utilized the definition of industry set out in section 771(4)(C) of the Tariff Act of 1930, (19 U.S.C. 1677(4)(C)). That definition allows the injury finding to be made with respect to less than all the domestic producers and less than the producers of the major proportion of domestic production. In this case, the ITC made its injury finding with respect to an eleven-state Northeastern region [4] and seven producers located therein.

The statutory provision which controls this determination reads as follows:

> (C) REGIONAL INDUSTRIES.—In appropriate circumstances, the United States for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if—
>
> (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and

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[1] *Sugars and Sirups From Canada*, Inv. No. 731-TA-3, USITC Pub. No. 1047 (March, 1980).

[2] *Atlantic Sugar, Ltd. Et Al.*, v. *United States*, No. 80-5-00754, USCIT, Slip Op. 81-62 (July 8, 1981).

[3] *Sugars and Sirups From Canada*, Inv. No. 731-TA-3 (October 5, 1981).

[4] The region consisted of the states of Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Vermont.

> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.
>
> In such appropriate circumstances, material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of subsidized or dumped imports into such an isolated market and if the producers of all, or almost all, of the production within that market are being materially injured or threatened by material injury, or if the establishment of an industry is being materially retarded, by reason of the subsidized or dumped imports.

The dispute regarding the correctness of limiting this determination to a region centers on the provision that "demand in that market is not supplied, to any substantial degree" by producers elsewhere in the United States. In its first determination the ITC found that this condition was satisfied by the fact that only 5.5 percent of the sales of producers outside the region were made to customs within the region. During the pendency of this judicial review, it acknowledged the error of making the calculation as a percentage of the total sales of those producers located outside the region and recognized the necessity of making its calculation as a percentage of all sales made within the region. When this was done, the percentage was approximately 12 percent for the period in question; that is to say, during the 1975–1979 period approximately 12 percent of the demand in this region was satisfied by domestic producers located outside the region. The Court remanded this matter for consideration of the new figure in relation to the statutory condition.

The ITC ha now repeated its determination that this region satisfies the conditions of the statute.[5] It has explained its determination in the following manner. It viewed subsection (4)(C)(ii) as requiring that the demand in the region not be satisfied "substantially" by domestic goods produced outside the region. It then proceeded to define the word "substantial" in the sense of what would represent a "substantial" degree of outside supply. Essentially it divided the matter into two calculations. It first determined whether the percentage was "substantial" in an empirical sense, and utilized a dictionary definition of "substantial" as "considerable in amount" to conclude that, on its face, 12 percent does not raise a question as to whether there is a "considerable" quantity or amount of nonregionally produced products being consumed in the region. It then found support

[5] See note 3, *supra*. The ensuing quoted excerpts are from pages 6, 7 and 8 of the ITC determination.

for this conclusion in the particular character of the region and the supply.

The Court detects in this explanation an alteration of the statutory standard. The word "considerable" has the meaning in a colloquial sense of "a good deal of" or a "large quantity."[6] If this is the implication of the ITC's explanation, then it is developing a standard under which a market can be considered isolated and separate for injury determinations even though its demand is satisfied to a meaningful extent from elsewhere in the United States. This would be at variance with the statute. The statute has a plain meaning and admonitory tone which clearly rules out anything except insubstantial supply from elsewhere. The Court understands the provision to forbid *any degree* of supply which could be characterized as substantial. This is the direct result of the use of the word "any" rather than the word "a." The statute therefore forbids any degree of supply from elsewhere beyond that which can be termed insubstantial under the circumstances.

This prohibition is consistent with the objective of finding a separate industry in an isolated market and insures that the basic justification exists for ignoring the remainder of the domestic industry. As a consequence, the Court does not approve the reasoning in the ITC determination which suggests that this percentage does not even present a difficulty.

In the abstract, this degree of penetration of the market is inconsistent with the statutory condition that the isolated market not be supplied from elsewhere to "any substantial degree." If this degree of supply from elsewhere was more evenly dispersed in the region, the Court would be inclined to find that the market was not sufficiently isolated in the statutory sense to be a proper microcosm for the application of the antidumping law. However, there were other factors considered by the ITC which dissuaded the Court from following this line of reasoning to a conclusion that the ITC had not acted in accordance with the law. These were factors showing inherent limitations in the sales data used by the ITC and also showing the concentration of outside supply in the periphery of the region. These factors led the Court to conclude that, even under its stricter view of the limitation on outside supply, the statutory conditions have not been violated in this case.

The significance of the 12 percent is reduced by the fact that a portion of the supply from elsewhere is generally confined to a part of Southern Ohio and to parts of Michigan. The inclusion of these areas in the region is explained by the practical difficulty of obtaining statistics on sales information other than for complete states. To the

[6] M. Nicholson, A. Dictionary of American-English Usage (Oxford University Press, 1957).

extent that the quantum of supply from elsewhere results from an imprecision inherent in the form of the available statistical data it does not discredit the ITC's finding.

Beyond this, when it is considered that much of the remaining outside supply is limited to the perimeter of the region the significance of the degree of supply from elsewhere is further diminished. It would be unreasonable to expect any market to be hermetically sealed off from the rest of the country. It follows that the existence of a modicum of supply from elsewhere on the perimeter of a region is consistent with the existence of a separate market in that region.

Due to these two modifying factors the Court does not consider that demand in this region was satisfied from elsewhere to any substantial degree.

Finally, on the subject of the existence of a regional industry the Court turns to a few related points argued by the parties. The Court sees no defect in the ITC's delineation of the market in a manner which varies from the boundaries discerned by other government agencies [7] or which excludes a nearby production facility such as Amstar's Baltimore plant. The record supports the view that this production facility has a marketing orientation away from the Northeast. There is no indication in the statute that the isolation of a market must only be the result of immutable commercial impediments such as transportation costs or geographical conditions beyond the control of the producers. It would appear that the deliberate marketing practices of producers can serve to justify the drawing of market boundaries between them even though they may have the physical capability of crossing those boundaries. Consequently, the decision not to include Maryland in the separate market is viewed as a permissible recognition of a market boundary and is not "arbitrary or freehanded sculpting," the possibility of which concerned the Court in its first opinion.

For the reasons expressed above, the ITC's treatment of an eleven-state region of the Northeastern United States as a separate market for the determination of injury is found to be in accordance with the law. This conclusion is reached despite the Court's disagreement with the ITC's expressed standard for determining whether demand in the market is being satisfied from elsewhere to any substantial degree. The ITC's findings with respect to other factors involved in the degree of supply from elsewhere justify the determination even under the Court's stricter view of the statutory standard.

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[7] For example, a map evidently prepared by the U.S. Department of Agriculture to show its Wholesale Sugar Price Quotation Regions includes Maryland, Delaware, Virginia and West Virginia in its Northeast Region. (Brief of Amstar Corporation Regarding Corrected Data before the ITC).

II

The remaining issue in this action involves the actual determination of material injury, specifically, whether the injury was experienced by "the producers of all, or almost all of the production within that market." In its original determination the ITC based its decision in significant part on the effect of the imports on the profits of the seven producers in the region, including a net loss for the Revere Sugar Corporation (Revere), the second largest producer, with approximately 24 percent of sales in the region. Corrected data revealed that Revere actually had a net profit for the period in question and the Court remanded the matter for a reconsideration of the question of injury. The ITC again concluded that the industry in the region had suffered material injury.[8] It averaged the data for Revere with that for the other producers and found that in the aggregate "all seven firms in the Northeastern states region have declining profits." The ITC concluded that "even with the corrected data, overall profits have declined but the decline was simply not as steep" and further that "the corrected data still support our finding that producers of all or almost all the production are materially injured."

The ITC rejected an argument by plaintiffs that it was incorrect to aggregate data for the purpose of determining whether the "producers of all or almost all of the production" are materially injured. The ITC justified its technique by stating that "the statute is concerned with determining whether a regional industry is being materially injured, not whether particular producers are injured." [9] It followed with an analysis of the law and legislative history purporting to justify a focus on the industry in the aggregate rather than on individual firms.

The law and its legislative history show only that the ultimate object of these investigations is to determine whether there is injury to an industry.[10] There is no justification for general or "aggregate" determinations which do not reflect the specific condition of individual producers included in the "aggregate." The Court therefore finds the method used by the ITC to evaluate the profitable operation of the second largest producer in the region to be at variance with the law.

Injury to an *industry* cannot be determined without first finding injury to individual producers. That is the unalterable and logical progression of the statutory determination. The Court is in complete disagreement with the statement in defendant's brief that "individual firm data are inherently unreliable in the context of a determination

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[8] See note 3, *supra*. The ensuing quoted excerpts are from page 14 of the ITC determination.
[9] See note 3. The quote is from page 15 of the ITC determination.
[10] S. Rep. No. 96-249, 96th Cong., 1st Sess. 82, 83 (1979).

aimed at establishing whether an entire region consisting of several firms is being materially injured or not." [11] It seems to the Court that individual firm data are the foundation of this determination and it is only when the facts show injury to individual producers that they may be utilized for broader conclusions about the industry. Furthermore, a conclusion about injury to the *industry* cannot be made until it is determined that those who are injured individually are, *in the aggregate*, the producers of "all or almost all" of the region's production. Thus, the only aggregation permitted by the law is that of the production of those who have been injured individually. If their production represents all or almost all of the region's production then the *industry* has been injured within the meaning of the law.

If there are producers who are not injured that fact must be confronted directly. It is incorrect to nullify the profitable operation of one producer by blending it with the loss of another and presenting the result as an "aggregate" indication of injury to both. A distinction must be maintained between those producers who are injured and those who are not. Once that distinction is made the question becomes whether those who are injured produce all or almost all of the region's production.

It must be recognized that, within a region, this law does not reach the injurious effect of importations sold at less than fair value unless the injurious effect extends to those within the region who produce *all or almost all* of the regional production. If anything, it can be said that injury in a regional industry must extend more completely to the production of the region than would injury in the national context. In the latter case industry is defined *inter alia* as "those producers whose collective output of the like product constitutes a *major proportion* of the total domestic production of that product." [emphasis supplied] (19 U.S.C. 1677(4)(A)) Thus, in the nation as a whole, injury can be found with respect to those who produce a "major proportion" of domestic production. In a region, injury can be found only if those who produce "all or almost all" of the production are injured. It would have been a simple matter to extend the first standard to a regional industry and require injury to those who produce a "major proportion" of the production in the region. In fact, however, the regional industry provision, in its inception, speaks only of the producers in the market and, when it comes to injury, to the producers of "all or almost all" of the production. In plain terms it would seem that "a major proportion" is not as much as "almost all" of something. This strongly suggests that the smaller the locale within which injury is sought, the more pervasive it must be.

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[11] Defendant's Supplemental Memorandum In Support of The International Trade Commission's New Determination at 14.

In light of the above, the ITC must first determine whether Revere was injured within the meaning of the statute. If it was injured, then it may be linked with those other producers who were injured. If the entire injured group produces all or almost all of the production, then a finding of injury to the industry is proper.

It bears repetition that this provision does not reach the injurious effect of importations sold at less than fair value unless the injurious effect extends to those within the region who produce *all or almost all* of the production. The number of those producers who are injured relative to the number who are not injured is immaterial.

If Revere did not suffer injury, the remaining question is only whether those who *were* injured produce all or almost all of the production. If this point is reached in the administrative determinations the Court does not presently see how the remaining 76 percent of production can be considered to be "all or almost all." It would seem that the plain meaning of this statutory requirement could only be satisfied by a percentage which came much closer to being all the production. Nevertheless, in these formative stages of the administration of this law and out of a scrupulous desire to extend to the administrative agency the fullest opportunity to consider any facts which justify a contrary result, the Court will not foreclose the possibility of such a conclusion at this time.

In light of the above, this matter is remanded to the ITC to determine whether the Revere Sugar Corporation suffered injury within the meaning of this statue and if not, whether there is any reason to conclude that those who *were* injured are the producers of all or almost all the production in the region. The ITC shall report its determination to the Court within 120 days of the date of entry of this order.

(Slip Op. 81–120)

SPRAGUE ELECTRIC COMPANY, PLAINTIFF *v.* UNITED STATES (CAPAR COMPONENTS CORP., PARTY-IN-INTEREST), DEFENDANT

Court No. 77–9–03056

Memorandum and Order on Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment

[Plaintiff's motion denied; defendant's cross-motion granted.]

(Decided December 28, 1981)

Frederick L. Ikenson, Esq., for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *Sidney N. Weiss*, trial attorney, for the defendant.

Introduction

Newman, *Judge:* The within action is again before this Court following my remand to, and reconsideration by, the United States International Trade Commission ("Commission") of its negative injury determination under the Antidumping Act of 1921, as amended (19 U.S.C. 160, *et seq.* (1970)) ("Antidumping Act") in Investigation No. AA1921–159 (41 FR 47604 (1976)). That investigation involved tantalum electrolytic fixed capacitors imported from Japan. See *Sprague Electric Company* v. *United States* (*Capar Components Corp., Party-in-Interest*), 84 Cust. Ct. 243, C.R.D. 80–3, 488 F. Supp. 910, *modified on rehearing*, 84 Cust. Ct. 260, C.R.D. 80–6 (1980).

Pending for decision are plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment. For the reasons indicated, plaintiff's motion is denied, and defendant's cross-motion is granted.

Background

Plaintiff is a domestic manufacturer of tantalum electrolytic fixed capacitors. On September 24, 1975 plaintiff, through counsel, submitted a complaint to the Commissioner of Customs alleging that tantalum electrolytic fixed capacitors from Japan were being sold at less than fair value ("LTFV") within the meaning of the Antidumping Act. Following an investigation, the Department of the Treasury determined on July 27, 1976 that tantalum electrolytic fixed capacitors (other than those produced and sold by Matsushita Electric Industrial Company, Ltd. ("Matsushita") from Japan were being or likely to be sold at LTFV within the meaning of the Antidumping Act (41 FR 31240 (1976)).

Thereafter, the Commission conducted an investigation to determine whether a domestic industry was being or was likely to be injured or was prevented from being established by reason of the importation of tantalum electrolytic fixed capacitors from Japan at LTFV. On October 22, 1976 a six-member Commission by a vote of 5 to 1 reached a negative determination, viz., the Commission majority determined that an industry in the United States was not being or likely to be injured or prevented from being established by reason of the LTFV imports (41 FR 47604 (1976)) (hereinafter "*Tantalum I*").

On September 14, 1977 plaintiff commenced this action challenging the Commission's negative injury determination, alleging *inter*

alia that the Commission relied upon false import statistics which underrepresented the true magnitude of LTFV imports.[1]

On August 22, 1978 the Commission published notice of the erroneous import statistics and invited the public to comment upon "whether the Commission's reliance on erroneous official statistics justifies further Commission action with respect to its determination in investigation No. AA1921–159" (43 FR 37233 (1978)).

On February 9, 1979 the Commission announced that no further action would be taken relative to its negative determination (44 FR 8359 (1979)).

On May 15, 1979 plaintiff filed its motion for summary judgment and shortly thereafter, defendant filed its cross-motion for summary judgment. These motions culminated in an order of the Court, entered on March 27, 1980, which provides:

> 1. Plaintiff's motion and defendant's cross-motion for summary judgment are denied at this time;
>
> 2. Proceedings in the instant case shall be stayed pending a reconsideration by the Commission of its original determination in Investigation No. AA1921–159 and the taking of a new vote on the question of whether, in light of the correct import statistics for tantalum electrolytic fixed capacitors from Japan, sales of such merchandise at LTFV were injuring or were likely to injure an industry in the United States within the meaning of the Antidumping Act of 1921, as amended; and the Commission may conduct any further proceedings which it deems appropriate, but consistent with this order;
>
> 3. The Commission shall, through counsel for defendant, submit to the Court within 90 days from the date of entry of this order its new determination, whether affirmative or negative, together with a complete statement of findings and conclusions, and the reasons or bases therefor, on all material issues of fact or law presented, including the materiality of the corrected import statistics on the Commission's new determination. [84 Cust. Ct. at 254–55.]

Subsequently, on April 25, 1980 plaintiff filed a motion for rehearing, and in a decision dated May 23, 1980 (C.R.D. 80–6) this Court ordered, so far as pertinent:

> 1. That plaintiff's motion for rehearing be granted to the extent that the Commission is directed to consider in its deliberations on remand the effect of Nippon Electric Company's

[1] There is no dispute that in *Tantalum I*, the import statistics before the Commission were erroneous. The Foreign Trade Division of the Bureau of the Census conducted an investigation of the accuracy of import statistics for tantalum electrolytic fixed capacitors from Japan by calendar quarters for 1975 through mid-1977. The investigation showed that for 1975 the actual volume of such imports was 21,814,079 units, whereas the erroneously reported volume of such imports during 1975, upon which the Commisiion relied, was 14,948,243 units. This translates into an increase in market penetration from 4.6 percent to 6.6 percent. Further, the investigation showed that for the first half of 1976 the actual volume of such imports was 19,328,083 units, whereas the erroneously reported volume of such imports during this period upon which the Commission relied was 13,769,411 units.

> plans to increase productive capacity for, and exportation to the United States, of epoxy dipped tantalum electrolytic fixed capacitors.

After receipt of the Court's order, as modified, the Commission published an invitation for comments "on the question of whether the Commission's earlier determination in investigation No. AA1921–159, Tantalum Electrolytic Fixed Capacitors From Japan, should change by virtue of considering 'epoxy dipped' tantalum electrolytic fixed capacitors exported to the United States by Nippon Electric Company to be within the class or kind of merchandise found by the Department of the Treasury to have been sold or likely to be sold at less than fair value" (45 FR 41249–50 (1980)).

On August 6, 1980, a five-member Commission determined, two Commissioners dissenting, "that as of October 22, 1976, the date of the Commission's earlier determination regarding tantalum electrolytic fixed capacitors from Japan, an industry in the United States was not being and was not likely to be injured, and was not prevented from being established, by reason of the importation of tantalum electrolytic fixed capacitors from Japan sold, or likely to be sold, at less than fair value within the meaning of the Antidumping Act, 1921, as amended." (45 FR 58729 (1980)) (hereinafter "*Tantalum II*").

In their joint statement of views, Chairman Alberger, Vice Chairman Calhoun, and Commissioner Stern, none of whom was a Commissioner when the first determination was rendered, offered this explanation:

> In arriving at its determination in this matter, the Commission has given due consideration to written submissions received from interested persons, information obtained during the course of investigation No. AA1921–159, and the corrected official import statistics for tantalum electrolytic fixed capacitors from Japan for the period January 1975 through June 1976 as reported by the Bureau of Census. With the exception of the corrected import statistics, the Commission has not considered any information obtained subsequent to the date of the earlier determination.
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> * * * * * * *
>
> In accordance with the instructions of the United States Customs Court [since November 1, 1980, the United States Court of International Trade] we have reviewed the confidential staff report of September 1976 and the statement of reasons in the Commission's report on *Tantalum Electrolytic Fixed Capacitors*, USITC Publication 789, October 1976, as revised to reflect corrected import statistics. In our deliberations we have considered all imports of tantalum electrolytic fixed capacitors from Japan less those from Matsushita Electrical Industrial Co., Ltd., as sales at less than fair value (LTFV) for the purpose of addressing present and future injury.

> We are persuaded that any injury suffered by the U.S. industry as of October 22, 1976, was not caused or likely to be caused by LTFV imports of tantalum electrolytic fixed capacitors (tantalum capacitors), but rather by the recessionary forces at work in the electronics industry. Taking into account the corrected import statistics, as well as the modification of the content of LTFV sales, we believe that the penetration of the U.S. market and the underselling of U.S. producers were not of sufficient magnitude to warrant a determination of injury by reason of LTFV sales.

The successor Commissioners proceeded to state that the evidence bearing on the existence of present injury indicated that although LTFV imports increased in the first six months of 1976 after having declined in 1975, other indices showed "a concurrent improvement in the health of the U.S. industry." They then noted that with respect to the first six months of 1976 these other indices showed that (a) domestic consumption of tantalum capacitors had increased, (b) capacity utilization rates were growing in the domestic industry, and (c) the domestic producers accounting for the "bulk" of United States production were experiencing increasing profits and high ratios of net operating profits to net sales. The new Commissioners further found that (a) increases in shipments of domestically produced tantalum capacitors exceeded the market gains achieved by LTFV imports throughout 1974–76; (b) "[o]nly the major supplier of LTFV capacitors consistently undersold domestic producers;" and (c) the frequency of actual sales of imports at LTFV was too low to cause the loss of sales to domestic producers. Additionally, in their findings of fact, the new Commissioners observed that "[a]lthough LTFV imports from Japan increased as a share of the U.S. market for tantalum capacitors throughout the period of investigation, at no time did the share of total U.S. consumption held by LTFV imports equal 10 percent." Regarding the likelihood of injury, the successor Commissioners stated:

> Information obtained during the investigation indicated that Japanese producers were increasing their capacity to produce tantalum capacitors in 1976 and 1977 and that some of the increased production would likely be exported to the United States. The information was obtained from three separate sources and was incomplete in that data from each source could not be correlated with the other sources. Further, the estimated increased capacity was not related to a base capacity such that the magnitude of the capacity increase could be quantified reliably. We believe that the information available to the Commission was not sufficient to impute a likelihood of injury. To the contrary, the domestic industry—growing before the recession—gave every indication that it was again growing in January-June 1976 after the recession abated. During the recession, the

> industry producing tantalum capacitors fared much better than the electronics industry as a whole.
>
> Consideration of Nippon Electric Company's *plans* to increase productive capacity for, and exportation to the United States of, epoxy dipped tantalum capacitors in and of itself does not establish grounds for a determination of likelihood of injury by reason of LTFV sales. We do not believe that an increase in the capacity of Japanese producers to manufacture tantalum electrolytic fixed capacitors portended a threat to a strong and growing industry in the United States. The evidence gathered by the Commission regarding any increased exports from Japan did not show real and imminent threat to the domestic industry. [Emphasis in original; footnote omitted.]

Commissioners Moore and Bedell dissented. In 1976, they had cast negative votes in *Tantalum, I*, and comprised part of the then five-member majority. In their Statement of Reasons for Affirmative Determinations in *Tantalum II*, Commissioners Moore and Bedell commented:

> When the Commission determined by a 5–1 vote in October 1976 that an industry in the United States was not being injured and was not likely to be injured by imports of tantalum electrolytic fixed capacitors from Japan sold, or likely to be sold, at less than fair value ("LTFV"), we voted with the majority. Our negative determinations at that time were based in part on official import statistics for tantalum capacitors from Japan subsequently discovered to have been substantially under reported and in part on our view that the anticipated increase in exports to the United States of "epoxy dipped" tantalum electrolytic fixed capacitors manufactured by Nippon Electric Co. ("NEC") should not be used as a basis for finding likelihood of injury. Our view in the latter regard was based on the fact that the Treasury Department had found no margins on NEC's sales of epoxy dipped capacitors.
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> * * * * * * *
>
> In reconsidering our earlier determinations in light of the Customs Court's decisions, we find ourselves in substantial agreement with the dissenting views of former Commissioner Parker on the question of likelihood of injury. Thus, we now find that, as of the date of the Commission's earlier determination, an industry in the United States was likely to be injured by reason of the importation from Japan of tantalum electrolytic fixed capacitors which the Treasury Department had determined were likely to be sold at LTFV. [Footnote omitted.]

Commissioners Moore and Bedell explained their reversal:

> In accordance with what we believe to be our mandate from the Customs Court, we have considered the class or kind of merchandise sold, or likely to be sold, at LTFV in this case to be all Japanese tantalum electrolytic fixed capacitors except those sold by Matsushita Electrical Industrial Co., Ltd. The combined

> effect of considering (I) all Japanese capacitors except those sold by Matsushita and (2) the revised import statistics, is to almost triple the ratio of LTFV imports to apparent U.S. consumption for 1975 and the first six months of 1976. * * * It is evident from these figures that the portion of U.S. apparent consumption accounted for by LTFV imports increased steadily during the period January 1972 through June 1976. We regard this increasing trend as an important indication that the U.S. tantalum capacitor industry was faced in October 1976 with the likelihood of injury.

Opinion

I

Plaintiff contends that as a matter of law the Commission should be deemed to have made an affirmative determination. Simply stated, it is plaintiff's hypothesis that had Commissioners Moore and Bedell known in 1976 what they knew of the facts and the law upon reconsideration of the case in 1980, they would have voted with Commissioner Parker, and an affirmative determination would have been reached by virtue of a tie vote. See 19 U.S.C. 160(a).

Plaintiff's contention arises from the following factual background:

> On October 22, 1976 a full six-member Commission, voting five to one, made a negative determination in *Tantalum Capacitors I*. The dissenter was Commissioner Parker who determined that there was likelihood of injury to the domestic industry by reason of LTFV sales. This dissent was based essentially upon the trend in LTFV imports since 1972, and the known plans of the Japanese to increase their productive capacity for, and exportation to the United States of, tantalum capacitors in 1976 and 1977. In assessing the significance of the future plans of the Japanese, Commissioner Parker considered Nippon's plans respecting epoxy dipped tantalum capacitors. Treasury had not found LTFV margins on sales of Nippon's epoxy dipped tantalum capacitors, but Treasury expressly refused to exclude them from the scope of its LTFV determination. Nippon had failed to submit appropriate information on its sales of this type of tantalum capacitor during Treasury's LTFV investigation, and consequently, Treasury concluded that Nippon had failed to show that its epoxy dipped tantalum capacitors had not been sold at LTFV. Commissioner Parker believed that the Commission was without authority to modify or refine the class or kind of merchandise subject to Treasury's LTFV determination.

The majority in the 1976 vote consisted of (then) Chairman Leonard, (then) Vice Chairman Minchew, (then) Commissioner Ablondi, and Commissioners Moore and Bedell. Of these five, only

Commissioners Moore and Bedell continued on the Commission when the second vote was taken in this case in 1980. In plaintiff's view, this circumstance is crucial. In the 1976 vote, Commissioners Moore and Bedell disagreed with Commissioner Parker's belief in the Commission's lack of authority to modify or refine a class or kind of merchandise that the Commission was obliged to consider. Further, Commissioners Moore and Bedell explained in part their votes by stating that since Nippon's epoxy dipped tantalum capacitors were not found to be sold at specific LTFV margins, Nippon's plans regarding this type of tantalum capacitor "should not be used as a basis for a finding of likelihood of injury."

As previously noted, by an order dated March 27, 1980 (C.R.D. 80–3), which order was subsequently modified on May 23, 1980 (C.R.D. 80–6), this case was remanded to the Commission with directions that it reconsider its original determination. The Commission's new vote was taken on August 6, 1980. A five member Commission, voting three to two, reaffirmed the original negative determination. However, the two dissenting votes—which were affirmative determinations of the likelihood of injury—were cast by Commissioners Moore and Bedell.

In this setting, plaintiff advances the novel argument that in the exercise of its equity powers, this Court should recognize that the successor Commissioners—Alberger, Calhoun, and Stern (who voted in the negative in *Tantalum II*)—stepped into the shoes of ex-Commissioners Leonard, Minchew and Ablondi (who had voted in the negative in *Tantalum I*); and that the affirmative votes of Commissioners Moore and Bedell in *Tantalum II* coupled with the affirmative vote of Commissioner Parker in *Tantalum I* result in a tie-vote. Interestingly, under the Antidumping Act, "the Commission shall be deemed to have made an affirmative determination if the Commissioners of the Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative". 19 U.S.C. 160(a). Thus, in effect, plaintiff asks this Court to close its eyes to the obvious facts that the Commission voting after remand in 1980 was comprised of five members rather than six (as in 1976); that Commissioner Parker was not a member of the Commission voting in 1980; and that in *Tantalum II* a majority of the Commissioners voting had cast their vote in the negative.

Plainly, plaintiff's argument is untenable. This Court is not required to, and will not under these facts and circumstances, hypothesize or speculate how the 1976 Commission or any of its members would have voted were there no error of facts or law. This case was remanded to the 1980 Commission for reconsideration, and Parker was not a Commissioner of "the Commission voting" in 1980. Hence,

Commissioner Parker's vote does not fall within the tie-vote provision in 19 U.S.C. 160(a). Moreover, plaintiff acknowledges that it has no legally cognizable interest in the composition of the Commission's membership (*Cf. Porter & Dietsch, Inc.* v. *F.T.C.*, 605 F. 2d 294, 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); and more, that the Commission is an ongoing entity whose changing membership does not affect its power to discharge its statutory duties (*Cf. Gamble-Skogmo, Inc.* v. *Federal Trade Commission*, 211 F. 2d 106, 112 (8th Cir. 1954); *Louis Lung Gooey* v. *Nagle*, 49 F. 2d 1016 (9th Cir. 1931)).

In short, this Court will not review a determination predicated upon a hypothetical tie-vote, but is bound to review the Commission's *actual* 1980 determination upon remand. Importantly, that 1980 determination was negative as to both existing injury and likelihood of injury by virtue of a majority vote of the five member Commission.

II

Plaintiff also challenges the determination of the Commission majority in *Tantalum II* on the ground that the new Commissioners allegedly failed to consider the record as a whole. According to plaintiff, the new Commissioners considered only the staff report and the original statement of reasons in *Tantalum I*. This argument is predicated solely upon the following portion of the majority's statement of reasons in *Tantalum II:*

> In accordance with the instructions of the United States Customs Court, we have reviewed the confidential staff report of September 1976 and the statement of reasons in the Commission's report on *Tantalum Electrolytic Fixed Capacitors*, USITC Publication 789, October 1976, as revised to reflect corrected import statistics.

But as evident from the foregoing, the statement of views of the new Commissioners does not state that they considered *only* the staff report and the October 1976 statement of reasons, as urged by plaintiff.

Defendant points to the following portion of the Commission's new determination and statement of reasons as indicating that the entire record was considered:

> In arriving at its determination in this matter, the Commission has given due consideration to written submissions received from interested persons, information obtained during the course of investigation No. AA1921–159, and the corrected official import statistics for tantalum electrolytic fixed capacitors from Japan for the period January 1975 through June 1976 as reported by the Bureau of Census. With the exception of the corrected import statistics, the Commission has not considered any information obtained subsequent to the date of its earlier determination.

Reading the above-quoted paragraphs together, and absent any showing to the contrary, I find that the Commission considered the entir. record, as asserted by defendant.

III

We turn to the issue of whether the Commission's 1980 negative determination is supported by substantial evidence.

The negative determination by the Commission's majority must be sustained if its findings and conclusions have a rational connection to its determination, and are supported by substantial evidence. Fundamentally, in reviewing and injury determination under the Antidumping Act, this Court may not weigh the evidence concerning specific factual findings, nor may the Court substitute its judgment for that of the Commission. *Armstrong Bros. Tool Co., et al.* v. *United States (Daido Corporation, Steelcraft Tools Division, Party-in-Interest)*, 84 Cust. Ct. 16, C.D. 4838, 483 F. Supp. 312, *aff'd* 67 CCPA , C.A.D. 1252, 626 F. 2d 168 (1980). See also *Pasco Terminals, Inc.*, v. *United States*, 68 CCPA , C.A.D. 1256, 634 F. 2d 610 (1980); *The Budd Company, Railway Div.* v. *United States (Nissho-Iwai American Corp. et al., Parties-in-Interest)*, 1 CIT , Slip Op. 80–15, 507 F. Supp. 997 (1980).

It is apparent that even after considering the correct import statistics and the appropriate class or kind of LTFV imports (see C.R.D. 80–3 and C.R.D. 80–6), not a single Commissioner concluded that an American industry was being injured by the LTFV imports. The Commission majority found that "any injury suffered by the U.S. industry as of October 22, 1976, was not caused or likely to be caused by LTFV imports of tantalum electrolytic fixed capacitors (tantalum capacitors), but rather by the recessionary forces at work in the electronics industry. Taking into account the corrected import statistics, as well as the modification of the content of LTFV sales, we believe that the penetration of the U.S. market and the underselling of U.S. producers were not of sufficient magnitude to warrant a determination of injury by reason of LTFV sales." The findings and conclusions of the Commission respecting the existence of injury are supported by substantial evidence and the negative determination is sustained.

Moreover, I find no error respecting the majority's negative determination of likelihood of injury. A determination concerning likelihood of injury involves a prognostication requiring a high degree of financial and economic expertise. Injury determinations under the Antidumping Act are committed by Congress to the sound discretion of the Commission; and as in most economic and financial prognostications,

knowledgeable persons reviewing the same data may differ in their conclusions respecting the outlook for the future. Here, a majority of the 1980 Commission rendered a negative determination as to likelihood of unjury, while two members of the Commission dissented.

The trepidations of Commissioners Moore and Bedell concerning, *inter alia*, the increasing trend in the portion of the apparent United States consumption accounted for by the LTFV imports during the period of January 1972 through June 1976, and the prospect of sharply increased exports to the United States of the Japanese tantalum capacitors, has been noted. Nevertheless, I find that the majority Commissioners correctly applied relevant criteria, and that there is a rational connection between the Commission's findings and conclusions and its negative determination respecting likelihood of injury. Further, I am satisfied that the Commission majority's negative determination is supported by substantial evidence.

In their statement of reasons, the majority Commissioners referred to the information obtained during the investigation which indicated that the Japanese producers were increasing their capacity to produce tantalum capacitors in 1976 and 1977, and that some of the increased production would likely be exported to the United States, However, the majority Commissioners found that the magnitude of the projected production would likely be exported to the United States. However, the majority Commissioners found that the magnitude of the projected increase in productive capacity of the Japanese producers in 1976 and 1977 could not be reliably quantified, and the majority did not consider the information before them sufficient to impute a likelihood of injury.

Significantly, the basic thrust of the majority's rationale on the question of likelihood of injury is that the domestic industry was strong and growing again in January to June 1976 after the recession had abated. And as pointed out by the majority, during the recession the industry producing tantalum capacitors fared much better than the electronics industry as a whole. Despite Nippon Electric Company's expansion plans and the increase in capacity of Japanese producers to manufacture tantalum capacitors, the Commission majority concluded that no threat of injury was portended. Thus, the Commission majority stated: "The evidence gathered by the Commission regarding any increased exports from Japan did not show real and imminent threat to the domestic industry" (45 FR 58730–31). The Commission concluded, *inter alia*, that "[o]ur determination is not materially affected either by consideration of the corrected import statistics or by the change in the class or kind of

merchandise covered by the final LTFV sales determination of the Department of the Treasury".[2]

In summary, the majority's negative determination is supported by these findings of fact:

1. The increase in domestic producers' shipments after the recession (finding of fact 6).
2. The increase in domestic consumption after the period of the economic downturn (finding of fact 7).
3. The increase in market share held by the domestic producers, which continued to increase in January to June 1976 (finding of fact 8).
4. The increased sales and profitability of the domestic producers during January to June 1976 as compared with the first half of 1975, and the profit-to-sales ratio of the domestic industry which was twice the level achieved by all makes of electrical and electronic equipment in 1976 (finding of fact 9).
5. The decline in year-end inventories from 1974 to 1975 (finding of fact 10).
6. The increased employment by domestic producers during January to June 1976 (finding of fact 11).
7. The recovery of capacity utilization by the domestic producers (finding of fact 12).

In essence, the evidence before the Commission indicated that the domestic industry emerged from the recession in a strong condition, and that it would grow in the future. This rationale applied by the Commission majority in its negative determination is appropriate; and the Court is satisfied that substantial evidence supports the negative determination. Hence, that determination is sustained.

For the foregoing reasons, plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted; and this action is dismissed.

Judgment will be entered accordingly.

(Slip Op. 81–121)

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORP., PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

Court No. 77–8–01685

I. The surcharge in the form of a 10% supplemental duty imposed pursuant to Presidential Proclamation 4074 was a valid exercise of

[2] In my order of March 27, 1980 (C.R.D. 80-3) the Commission's Statement of Reasons was required to disclose the materiality of the corrected import statistics on its new determination.

authority delegated to the President by section 5(b) of the Trading With the Enemy Act to regulate importations at a time of a declared national emergency.

II. The imposition of the surcharge did not constitute an act causing a "vesting" within the meaning of section 5(b) of the Act and, accordingly, the supplemental duty paid by the plaintiff is not recoverable under the provisions of section 9(a) of the Act.

III. The decisions of the CCPA in the case of *United States* v. *Yoshida International*, 63 CCPA 15, 526 F. 2d 560 (1975) and in the case of *Alcan Sales* v. *United States*, 63 CCPA 83, 534 F. 2d 1920 (1976), *cert. denied*, 429 U.S. 986 (1976) are stare decisis of the issues herein.

[Motion of plaintiff for summary judgment, denied; motion of defendant, in the alternative, for summary judgment, granted.]

(Decided December 29, 1981)

Barnes, Richardson & Colburn (*David O. Elliott, Rufus E. Jarman, Jr.*, and *Michael A. Johnson* at oral argument and on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General (*David M. Cohen*, Branch Director, Commercial Litigation Branch and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch at oral argument and on the brief), for the defendant.

BOE, *JUDGE:* It, indeed, is an illustrative exercise in the art of jurisprudential survival that the surcharge issue contained in the instant action, first, having been the subject matter of litigation presented to this court and the appropriate appellate forums,[1] thence the subject matter of litigation presented to the U.S. District Court, District of Columbia,[2] and the U.S. District Court for the Central District of California[3] and their respective appellate forums, emerges again in the present proceedings.

Due to the passage of time since this issue was originally before this court, the following facts are reviewed.

On August 15, 1971, the President in declaring a national emergency "* * * to strengthen the international economic position of the United States" issued Presidential Proclamation 4074 assessing a surcharge in the form of a supplemental duty in the amount of 10% on all imported dutiable merchandise except certain merchandise specifically

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[1] *Yoshida International* v. *United States*, 73 Cust. Ct. 1378 F. Supp. 1155 (1974), *rev'd.*, 63 CCPA 15, 526 F. 2d 560 (1975); *Alcan Sales* v. *United States*, 63 CCPA 83, 534 F. 2d 920 (1976), *cert., denied* 429 U.S. 986 (1976).

[2] *Henry Pollack* v. *Blumenthal*, 444 F. Supp. 56 (D.D.C. 1977), *aff'd. mem.*, 593 F. 2d 1371 (D.C. Cir.), *cert. denied*, 444 U.S. 836 (1979).

[3] *Cornet Stores* v. *Morton*, 632 F. 2d 96 (9th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S. Ct 2016 (1981).

exempted therefrom.[4] The 10% surcharge was terminated on December 20, 1971, by Presidential Proclamation 4098 (36 FR 24201 (1971)). The subject merchandise in the instant action was imported into the United States from Canada and entered on November 30, 1971. Upon liquidation a protest was filed by the plaintiff and a denial thereof was made by the Customs Service. A summons was timely filed in this court.

The plaintiff in the instant action does not challenge the prior decision of the CCPA in *United States* v. *Yoshida International*, 63 CCPA 15, 526 F. 2d 560 (1975), in which it was determined that Presidential Proclamation 4074 was a valid exercise of the authority granted to the President by the Congress in section 5(b) of the Trading With the Enemy Act, 50 U.S.C. app. section 5(b) to regulate imports. Predicating its claim, however, under section 9(a) of the Trading With the Enemy Act (TWEA), plaintiff now seeks recovery of the supplemental duty paid by it together with interest. The fact that it neither was nor is an enemy or ally of an enemy of the United States as defined in section 2 of the TWEA, plaintiff contends, causes the retention of the surcharge paid by it to be an unlawful "taking" and, accordingly, recoverable in this proceeding.

In bar to plaintiff's claim, the defendant asserts four principal defenses: (1) lack of jurisdiction of this court over the subject matter of the instant action, (2) the statute of limitations barring plaintiff's claim under section 9(a) of the TWEA, (3) *res adjudicata* and (4) collateral estoppel.

In its consideration of this cause of action the court necessarily must initially determine the validity of defendant's alleged affirmative defense that jurisdiction does not lie with this court. This jurisdictional defense of the defendant is based upon the provision contained in section 9(a) of the TWEA that in any action brought thereunder to recover property "held" and/or "vested" pursuant to section 5(b) by the United States, suit may be instituted "in the district court of the United States." Accordingly, the defendant

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[4] Presidential Proclamation 4074 in relevant part stated:

WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result our continued ability to assure our security could be impaired;

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

* * * * * * * *

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles * * * provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

contends, jurisdiction with respect thereto has been placed by the Congress exclusively in the United States district court.

The plaintiff asserts, and with some justification, that it has been placed on the horns of a dilemma by defendant's jurisdictional defense in light of the circuitous journey which has been necessitated to date in connection with an attempt to seek a full judicial resolution of the surcharge issue and, in particular, with respect to the right of recovery of the supplemental duty paid by the plaintiff under the provisions of section 9(a) of the TWEA. The import of the decisions rendered in the surcharge cases adjudicated in the United States district courts and affirmed upon appellate review, in essence, held that the Customs Court, now the United States Court of International Trade, properly assumed jurisdiction over challenges to the surcharge imposed by Presidential Proclamation 4074 and that by virtue of the exclusive jurisdiction granted to this court by the provisions of 28 U.S.C. 1582 (1976), the United States district court did not possess jurisdiction of the subject matter relating to imports.[5]

Notwithstanding the plaintiff in its argument has relied principally upon the provisions of section 9(a) of the TWEA to provide the relief sought in the instant proceeding, it will be noted that among other bases the plaintiff has specifically claimed jurisdiction under 38 U.S.C. 1581(a) providing:

> § 1581. Civil actions against the United States and agencies and officers thereof
>
> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.[6]

It is by virtue of the jurisdiction acquired pursuant to the foregoing statutory provision that this court proceeds with the determination of the instant action and, accordingly, denies the defendant's motion to dismiss the action of the plaintiff for lack of jurisdiction.

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[5] In the decisions in *Pollack* v. *Blumenthal*, *supra*, and *Cornet Stores* v. *Morton*, *supra*, the respective United States courts did not address at length the applicability of section 9(a) with respect to the recovery of property in the form of the supplemental duties imposed by the surcharge in issue and paid by the plaintiffs. Nor did the decisions therein address at length the exclusivity of the jurisdiction of the United States district court with respect to the claim brought allegedly pursuant to section 9(a), as herein asserted. Principal reference thereto is contained only by way of a footnote in the *Pollack* decision, stating:

> * * * It is obvious on its face that 9(a) confers jurisdiction upon the federal district courts only to consider challenges to the wartime application of section 5(b) and to identifications of parties as 'enemies.' Section 9(a) is not relevant to those portions of Section 5(b) which empower the President to regulate foreign trade during peacetime.

444 F. Supp. at 59–60, n.2.

[6] Though enacted October 10, 1980, more than six years after this suit was filed, this section was made applicable to the suit at hand by Act of December 17, 1980, P.L. 96-542, 94 Stat. 3209 section (a) which declared that 28 U.S.C. 1581(a) was applicable to civil actions pending on or commenced on or after November 1, 1980.

In accepting jurisdiction over the subject matter herein it cannot be said that the court is so circumscribed as to preclude its consideration of statutory provisions which may have been alleged to be applicable and/or controlling. In other words, instead of skirting the parameters of section 9(a) of the TWEA, with only oblique references thereto, this court deems it not only proper but obligatory at the outset to consider the applicability of this section of the Trading With the Enemy Act with respect to the claim which plaintiff asserts has been neither determined on its merits in *United States* v. *Yoshida International*, *supra*, *Alcan Sales* v. *United States*, *supra*, not in any subsequent action.

From the time of the initial enactment of the Trading With the Enemy Act, it is clear that two distinct and independent powers were conferred therein on the President by the Congress: (1) the power to "regulate" and (2) the power to "seize" and "hold" property. In the original act enacted in 1917 the former power was conferred by section 5(b), the latter power by section 7(c). It was solely with respect to the property seized and held by the direction of the President in accordance with the power conferred upon him by section 7(c) that authority was granted to a claimant, not an enemy or ally of an enemy, by section 9 to institute a suit in equity in the district court of the United States to establish his right title or interest thereto. Through successive amendments, particularly with respect to section 5(b), the powers of the President under the TWEA were from time to time expanded. In consideration of the surcharge presently in issue, we are, accordingly, guided by section 5(b) of the Act as amended in 1941.[7]

While amendments to the respective sections of the TWEA were made from time to time, it is noteworthy that section 9(a) continued to remain without change and in its original form as enacted. This fact

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[7]/ Section 5(b) of the Trading With the Enemy Act as amended on December 18, 1941 provides:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any propery or interst of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion, thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

served as the occasion for the Supreme Court in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947), to consider the relationship between section 2, section 5(b) as amended and section 9(a) of the Act and their respective applications. Although the Court therein expressly recognized that the amended section 5(b) "* * * granted the President the power to vest in an agency designated by him 'any property or interest of any foreign country or national thereof,'" the footnote contained in the Court's decision makes it abundantly clear that the amended section 5(b) *also* granted to the President the additional powers enumerated therein, specifically a regulatory power.[8]

It is these two distinct independent powers that this court deems necessary to address in making a determination which, hopefully, will effect a resolution of the issue involved herein. If the imposition of the supplemental duties pursuant to Presidential Proclamation 4074 constituted an act causing a "vesting" of any property or interest of any foreign country or national thereof, then and in that event a claim for the recovery of such property might be maintained by the plaintiff under section 9(a). On the other hand, if the imposition of the supplemental duty imposed by Presidential Proclamation 4074 was in fact only an exercise of a delegated authority under section 5(b) to regulate importations during a period of national emergency, then and in that event section 9(a) and the provisions thereof are inapplicable. It is only if the applicability of section 9(a) is confirmed that it becomes necessary to reach the issue of the jurisdiction of this court thereunder.

The court concludes that plaintiff's claim predicated under section 9(a) of the TWEA is misconceived and misplaced. The provisions of section 9(a) serve a purpose directly related to the "vesting" power granted to the President by section 5(b). It is by virtue of section 9(a) that the constitutionality of the "vesting" power is insured. In *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211 (1958), the United States Supreme Court stated:

> Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonemeny claimant a later judicial hearing as to the propriety of the seizure. (Citations omitted.)

This court, however, has not been persuaded that the purpose and intent of the President in imposing the surcharge in question

[8] The footnote contained in the Court's decision stated:

> Section 5(b)(1), as amended, also granted the President the power to "investigate, regulate, direct and compel, * * * any * * * importation * * *" At 485, n.4.

See also, United States v. *Yoshida International, supra*, wherein our appellate court recognized that section 5(b) granted to the President the power to "vest" as well as the power to "regulate." At 24, n.17.

was to sequester and hold property in which any foreign country or a national thereof had an interest. Neither the declaration of the emergency by the President nor the manner of imposition of the surcharge would lend credence to such a contention. The preservation of our monetary reserves, the maintenance of an international competitive position, the preservation of a favorable balance of payments position, indeed, are objectives which are not consonant with the objective of impounding foreign assets within this country. The uniform rate of supplemental duty imposed on imports from all nations without discrimination likewise fails to support any attempted rationalization that the imposition of the surcharge by the President constituted an act of appropriation of the property or property interests of a foreign nation or a national thereof creating a claim which could be asserted by a citizen of the United States instituting a legal action for the recovery thereof under the provisions of section 9(a) of the TWEA.

As afore-indicated, plaintiff has acknowledged that it does not take issue with the decision of our appellate court in the case of *United States* v. *Yoshida International, supra.* In view of this acknowledgment it is difficult to ascertain the consistency of plaintiff's present contention that a determination with respect to the validity of the surcharge in question and that a recovery of the additional duties paid by the plaintiff as a result of the imposition of such surcharge now should be made in accordance with the provisions of section 9(a) of the TWEA.

The decision of our appellate court in the *Yoshida* case is explicit in its holding that the President was delegated the authority by section 5(b), during war or national emergency, to "regulate importation." As stated by the court therein the sole question which remained to be determined was "what means of execution of the delegated power are permissible." 63 CCPA at 24. The court thereupon, recognizing the long-established constitutional principle that the power to tax and impose duties on imports may be employed in the exercise of the separate and distinct power to regulate commerce, upheld the validity and constitutionality of the surcharge imposed by Presidential Proclamation 4074 and the supplemental duties assessed thereunder. To again review at length the authorities supportive of our appellate court's determination in *Yoshida* would be only time-consuming and without significant purpose. *See: Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824); *Hampton & Co.* v. *United States*, 276 U.S. 394, 411 (1928); *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, 428 (1940).

However, the plaintiff in an effort to circumvent the *Yoshida* decision seeks refuge in the statement contained therein that "the

surcharge was not imposed to raise revenue but to provide the U.S. external position with some temporary protection." 63 CCPA at 29, n.26. Contending that the President thus was "taking" property of American citizens for the public good in time of national emergency to force foreign countries having an interest in such property to "come to terms" on an international monetary agreement, the plaintiff concludes that it has been deprived of its constitutional right of just compensation. Suffice it to say, plaintiff's argument must be found wanting in relevancy as well as in substance. The provision contained in Presidential Proclamation 4074 that the total duty, including the 10% supplemental duty, could in no event exceed the rate prescribed in column 2 of the Tariff Schedules of the United States, negates the hypothesis of the plaintiff that the imposition of the surcharge was of such an arbitrary, unreasonable and confiscatory character as to constitute a "taking" without just compensation. The incongruity of plaintiff's contention may be evidenced by the recent decision of the United State Supreme Court in the case of *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978):

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922), and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example.

There are occasions, however, when certain decisions, despite the dust which might have accumulated upon their yellowed pages, place in perspective more accurately the pertinent and applicable principles of law than can be articulated in 10,000 words. In the case of *Board of Trustees* v. *United States*, 289 U.S. 48, 58–59 (1933), Chief Justice Hughes has set forth with singular clarity the distinction between the separate and independent powers to tax and lay duties and the laying of duties in the exercise of that independent power to regulate commerce.

> It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. *Gibbons* v. *Ogden*, *supra*, p. 201. It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons* v. *Ogden*, *supra*, p. 202. "Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the

> safety of passengers, and the protection of property." *Groves* v. *Slaughter*, 15 Pet. 449, 505. The laying of duties is "a common means of executing the power." 2 Stroy on the Constitution, § 1088. It has not been questioned that this power may be exerted by laying duties "to countervail the regulations and restrictions of foreign nations." *Id.*, § 1087. And the Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects. Its requirements are not the less regulatory because they are not prohibitory or retaliatory. They embody the congressional conception of the extent to which regulation should go. But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate foreign commerce permeats the entire congressional plan. The revenue resulting from the duties is an incident to such an exercise of the power. It flows from, but does not create the power." *Id.*

From the explicit language of President Proclamation 4074 this court is satified that, as stated in *Board of Trustees* v. *United States*, *supra*, the purpose to regulate foreign commerce under the authority delegated to him by section 5(b) permeated the entire plan of the President.

Jurisdiction of the instant action having been acquired pursuant to 28 U.S.C. section 1581(a), the court finds that section 9(a) of the TWEA is inapplicable to the determination of the issue herein. The imposition of the surcharge in question was a valid exercise of authority delegated to the President by section 5(b) of the TWEA to regulate importations at a time of a declared national emergency and for the purposes set forthwith particularity in Presidential Proclamation delegated to the President by section 5(b) of the TWEA to regulate 4074. The imposition of the surcharge did not constitute an act causing a "vesting" within the meaning of section 5(b). No conclusion can be reached therefore by this court other than the decisions of our appellate court in the case of *United States* v. *Yoshida International*, supra, and in the case of *Alcan Sales* v. *United States*, *supra*, are, in fact, stare decisis of the issues herein.

In view of the foregoing it is unnecessary to consider the additional defenses asserted by the defendant.

The motion of the plaintiff for summary judgment, accordingly, is denied. The motion of the defendant, in the alternative, for summary judgment, is granted.

Let judgment be entered accordingly.

(Slip Op. 81-122)

INTERNATIONAL FASHIONS, A CORPORATION, PLAINTIFF *v.* ANGELA MARIE BUCHANAN, TREASURER OF THE UNITED STATES; DONALD T. REGAN, SECRETARY OF THE TREASURY DEPARTMENT; WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES; WILLIAM T. ARCHEY, ACTING COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, DEFENDANTS

Court No. 81-6-00744

I. 28 U.S.C. § 2636(i) providing that a civil action of which this court has jurisdiction under § 1581, other than an action specified in subsections (a)-(h) thereof, is barred unless commenced within two years after the cause of action first accrues, must be construed prospectively and not retroactively. The two-year period of time for the commencement of an action, accordingly, begins to run from the effective date of the statutory provision—November 1, 1980.

II. A cause of action created under § 9(a) of the Trading With the Enemy Act relates solely to the recovery of property seized and/or vested pursuant to the Trading With the Enemy Act and is not only inapplicable, but fails to state a claim upon which relief can be granted in the instant action.

III. The surcharge imposed by Presidential Proclamation 4074 did not constitute a vesting of property within the meaning of § 5(b) of the Trading With the Enemy Act nor a taking of property within the intendment of the Fifth Amendment to the Constitution of the United States.

IV. The decisions of the CCPA in the case of *United States* v. *Yoshida International, Inc.*, 63 CCPA 15, 526 F. 2d 560 (1975) and in the case of *Alcan Sales* v. *United States*, 63 CCPA 83, 534 F. 2d 1920 (1976), *cert. denied*, 429 U.S. 986 (1976) are stare decisis of the issues herein.

[Motion of defendants to dismiss the above-entitled action for lack of jurisdiction, denied; motion of defendants, in the alternative, for summary judgment, granted.]

(Decided December 29, 1981)

Glad, White & Ferguson; Glad & White and *Glad, Tuttle & White* (*Robert Glenn White* at oral argument and on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; (*David M. Cohen*, Branch Director, Commercial Litigation Branch at oral argument and on the brief, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch at oral argument), for the defendants.

BOE, Judge: The consideration of the above-entitled action initially requires a determination with respect to the subject matter

encompassed therein. The plaintiff claiming jurisdiction of this court under 28 U.S.C. § 1581(i) seeks recovery of supplemental duties imposed by Presidential Proclamation 4074 on certain merchandise imported by the plaintiff into the United States between August 16, 1971, and December 20, 1971.[1] Plaintiff, however, predicates its cause of action with respect to the recovery of the said supplemental duties upon the provisions of § 9(a) of the Trading With the Enemy Act (50 U.S.C. app. § 9(a)).

Although plaintiff annexes to its complaint exhibits 1, 2 and 3 enumerating the specific entries imported by the plaintiff as well as the amount of the supplemental duty imposed and paid in connection therewith, it appears from the records of this court that the majority of the entries set forth in the aforesaid schedules have been made a part of and are the subject of stipulations entered into between the plaintiff and the United States Government wherein it is agreed that the final determination of *Alcan Sales, Div. of Alcan Aluminum Corp.* v. *United States*, Court No. 77–8–01687 shall be binding and conclusive upon the parties as to the surcharge issue therein.

It will be noted, therefore, that only 26 of the entries set forth in exhibit 1 annexed to plaintiff's complaint represent the subject matter of the instant action in which plaintiff seeks recovery.[2]

Issue having been joined herein, the defendant has moved the court to dismiss this civil action for lack of jurisdiction or, in the alternative, to grant summary judgment in its favor.

In support of its motion to dismiss the instant action for lack of jurisdiction, the defendants assert that a technical amendment to the Customs Courts Act of 1980, Pub. L. 96–542, 94 Stat. 3209, prevents this court from acquiring jurisdiction of the instant action under 28 U.S.C. §1581(i). The technical amendment provides that §1581(i) shall apply only with respect to civil actions commenced on or after the effective date of the Customs Courts Act of 1980—November 1, 1980. With respect to the 26 entries constituting the subject matter of the instant action, this court finds that none of said entries had been a part of a civil action filed with this court prior to its effective date of November 1, 1980. The foregoing asserted basis of defendants' motion, accordingly, cannot be sustained.

As a further ground for its motion to dismiss the instant action for lack of jurisdiction the defendants assert the limitations relating

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[1] For a more complete background of the surcharge issue reference is made to the related case of *Alcan Sales, Div. of Alcan Aluminum Corp.* v. *The United States*, Court No. 77-8-01685, Slip Op. 81-121, decided under even date herewith.

[2] The 26 entries above-referred to are set forth in Schedule 1 attached hereto.

to the commencement of civil actions contained in 28 U.S.C. §2636 (i) providing:

> (i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)–(h) of this section, is barred unles commenced in accordance with the rules of the court within two years after the cause of action first accrues.

The defendants contend that inasmuch as the surcharge duties were paid by plaintiff between August 16 and December 20, 1971, the respective causes of actions seeking recovery of such payments, necessarily, accrued at the time of payment in the year 1971—10 years prior to the commencement of the present action—and therefore barred by the foregoing statutory provision. Although it is recognized that some court decisions may sustain defendants' contention, this court is disposed to follow the interpretation by the Supreme Court of the United States with respect to statutes limiting the time of commencement of civil actions. The United States Supreme Court in the case of *Sohn* v. *Waterson*, 84 U.S. (17 Wall.) 737, 738 (1873) has stated:

> But if an action accured more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a prospective operation.

Quoting from Chief Justice Taney, the Court continued:

> "The question is," . . . . "from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided."

See also United States v. *St. Louis, etc. Ry. Co.*, 270 U.S. 1 (1925). This court, therefore, concludes that the absence of specific statutory intent to the contrary causes §2636 (i) to be construed prospectively instead of retroactively. Accordingly, the two-year period of time permitted for the commencement of a civil action pursuant to §2636 (i) begins to run from the effective date of the statutory provision—November 1, 1980. The instant action having been commenced on June 11, 1981, by the filing of a summons and complaint, defendants' motion to dismiss the same must be found to be without substance and, accordingly, denied.

Plaintiff in its complaint, while asserting jurisdiction under §1581 (i), predicates its cause of action under §9(a) of the Trading With the Enemy Act (TWEA). Section 1581 (i) frequently has been

characterized as a residual grant of jurisdiction to this court. Contrary to the conception that this statutory provision may have created an all-inclusive grant of jurisdiction relating to matters concerning importations and international trade, supplemental to and in addition to the jurisdictional grants expressly defined in § 1581 (a)–(h), examination and careful reading of subsection (i) clearly indicates the intention of the Congress to specifically delineate the nature of the "exclusive" supplemental jurisdiction therein provided. In so doing, the Congress has extended the jurisdiction of this court *only* to

> any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

That the undisputed facts in the instant action fall within the subject matter jurisdictional grant of § 1581(i)(2) and (4) is patently established by the pleadings. The complaint of the plaintiff alleges the imposition of supplemental duties, pursuant to Presidential Proclamation 4074, on all dutiable merchandise imported into the United States. The complaint further acknowledges the payment of monies to the Treasurer of the United States amounting to 10% ad valorem on all dutiable merchandise imported by it into the United States between August 16, 1971 and December 20, 1971. Clearly, the subject matter before this court relates to duties on imports within the contemplation of § 1581(i)(2). Thus the real issue confronting this court is not one of jurisdiction of the subject matter but rather whether the cause of action on which the plaintiff predicates its present claim and prayer for relief is one upon which relief can be herein granted.

The plaintiff has not challenged the validity of the imposition of the surcharge imposed by Presidential Proclamation 4074 nor taken issue with the decisions of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, 63 CCPA 15, 526 F. 2d 560 (1975) and *Alcan Sales* v. *United States*, 63 CCPA 83, 534 F. 2d 1920 (1976), *cert. denied*, 429 U.S. 986 (1976), sustaining the power of the President to regulate imports by the imposition

of duties pursuant to the authority granted by § 5(b) of the TWEA. The gravamen of plaintiff's cause of action is the alleged continued holding and retention of property by the Treasurer of the United States belonging to a United States resident, not an enemy or an ally of an enemy of the United States. Section 9(a) of the Act, upon which plaintiff predicates its claim, is a remedial statute of special purpose. It provides a judicial remedy only to

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, * * *

As so clearly pointed out in the case of *Societe Internationale*, v. *Rogers*, 357 U.S. 197, 211 (1958), the United States Supreme Court stated:

> Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure. (Citations omitted.)

A cause of action created by § 9(a) of the Trading With the Enemy Act relates solely to the recovery of property seized and/or vested pursuant to the TWEA and, accordingly, not only is inapplicable but fails to state a claim upon which relief can be granted to the plaintiff in the instant action.

In the case of *Alcan Sales, Div. of Alcan Aluminum Corp.* v. *United States*, Court No. 77–8–01685, Slip Op. 81–121, under even date herewith, this court, in considering a claim for the recovery of supplemental duties imposed pursuant to Presidential Proclamation 4074, held that § 9(a) of the TWEA, under which that cause of action was likewise predicated, was inapplicable to the determination of the issue therein. The court further found the surcharge in question imposed by Presidential Proclamation 4074 was a valid exercise of authority delegated to the President by § 5(b) of the TWEA to regulate importations at a time of a declared national emergency and for the specific purposes set forth with particularity in the Proclamation. The imposition of the surcharge in the instant action, as in the case of *Alcan Sales, Div. of Alcan Aluminum Corp.* v. *United States*, Court No. 77–8–01685, did not constitute a "vesting" of property within the meaning of § 5(b) of the TWEA, nor a taking of property within the intendment of the Fifth Amendment to the Constitution of the United States. The reasoning of this court as more fully expressed in *Alcan Sales, Div. of*

Alcan Aluminum Corp., Court No. 77–8–01685, is deemed relevant and appropriate hereto without the need of further repetition.

This court concludes that the decisions of our appellate court in the cases of *United States* v. *Yoshida International, Inc.*, *supra*, and *Alcan Sales* v. *United States*, 63 CCPA 83, 534 F. 2d 1920 (1976), *cert. denied*, 429 U.S. 896 (1976), are stare decisis of the issue herein.

Accordingly, the alternative motion of the defendant for summary judgment is granted.

Let judgment be entered accordingly.

SCHEDULE 1

Entry No.	Entry No.
71–808822	71–820587
71–812530	71–824074
71–812686	71–823475
71–813692	71–829417
71–815083	71–819650
71–809107	71–808448
71–816552	71–821667
71–818582	71–824054
71–822086	71–813873
71–819691	71–817242
71–819890	71–138189
71–820588	71–141445
71–820586	71–828974

(Slip Op. 81–123)

BORDER BROKERAGE CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 74–11–03050

Logging Implements and Tractor Parts

Various articles used for rigging in the harvesting of trees were classified as articles of iron or steel under item 657.20, Tariff Schedules of the United States, *held* properly entitled to entry free of duty under the provisions of item 666.00, TSUS, as agricultural implements.

The harvesting of trees is an agricultural pursuit. *United States* v. *Norman G. Jensen, Inc.*, 64 CCPA 51, C.A.D. 1183, 550 F. 2d 662 (1977). Accordingly, implements chiefly used for such purpose are agricultural implements within the purview of item 666.00, *supra*.

The term "implements", as used in the free provisions covering

agricultural implements, is given a broad meaning. *Wilbur-Ellis Co. v. United States*, 26 CCPA 403, C.A.D. 47 (1939).

Certain corner bits and repointer tips *held* subject to classification under item 664.05, TSUS. Grouser bars and caps *held* classifiable under item 692.30 or 692.35, TSUS, depending upon size.

[Judgment in part for plaintiff.]

(Decided December 30, 1981)

George R. Tuttle (*Stephen S. Spraitzar* at the trial and on the briefs) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Insernational Trade Field Office, Commercial Litigation Branch (*Robert H. White* at the trial and on the brief), for the defendant.

FORD, *Judge:* Plaintiff by this action contests the classification and assessment of duty of basically two types of merchandise. The first category consists of numerous items set forth in schedule A, attached hereto and made a part hereof, which plaintiff contends are chiefly used by the logging industry and therefore entitled to entry free of duty under item 666.00, Tariff Schedules of the United States. All of the merchandise contained in schedule A was classified by Customs under the basket provision for metals, item 657.20, TSUS, as articles of iron or steel and assessed with duty at various rates depending upon the date of entry. The second category consists of the four articles set forth in schedule B, attached hereto and made a part hereof, which plaintiff claims are parts of tractors suitable for agricultural use and, as such, entitled to entry free of duty under item 692.30, TSUS. The grouser bars and caps are alternatively claimed to be dutiable at 9%, 8%, 6.5% or 5.5% ad valorem under item 692.35, TSUS, depending upon date of entry. The corner bits and repointer tips are alternatively claimed to be subject to duty at 8%, 7%, 6% or 5% ad valorem under item 664.05, TSUS, depending upon date of entry.

The pertinent statutory provisions are as follows:

	Articles of iron or steel, not coated or plated with precious metal:	
	* * * * * * *	
	Other articles:	
	* * * * * * *	
657.20	Other	15%, 13%, 11%, or 9.5% ad valorem, depending upon date of entry.

666.00	Machinery for soil preparation and cultivation, agricultural drills and planters, fertilizer spreaders, harvesting and threshing machinery, hay or grass mowers (except lawn mowers), farm wagons and carts, milking machines, on-farm equipment for the handling or drying of agricultural or horticultural products, and agricultural and horticultural implements not specially provided for, and parts of any of the foregoing	Free.
664.05 [1]	Mechanical shovels, coal-cutters, excavators, scrapers, bulldozers, and other excavating, levelling, boring, and extracting machinery, all the foregoing, whether stationary or mobile, for earth, minerals, or ores; pile drivers; snow plows, not self-propelled; all the foregoing and parts thereof	8%, 7%, 6% or 5% ad valorem, depending upon date of entry.
	Tractors (except tractors in item 692.40 and except automobile truck tractors), whether or not equipped with power take-offs, winches, or pulleys, and parts of such tractors:	
692.30	Tractors suitable for agricultural use, and parts thereof	Free.
	* * * * * * *	
692.35 [1]	Other	9%, 8%, 6.5%, or 5.5% ad valorem, depending upon date of entry.

The record consists of the testimony of five witnesses called on behalf of plaintiff and the receipt in evidence of exhibits 1 through 11 and exhibits 13 through 18. Defendant offered, and there were received in evidence, seven exhibits.

There being two different categories of merchandise, consideration will be given first to those items set forth in schedule A. The court notes that in plaintiff's second amended complaint in paragraph 8 it is

[1] Pleadings deemed amended to conform to evidence pursuant to Rule 15(b) of the rules of this court.

alleged that the merchandise (set forth in schedule A) is chiefly used in logging applications. To this statement defendant, in its answer to the second amended complaint, admits such chief use.

Plaintiff correctly contends that under authority of *United States* v. *Norman G. Jensen, Inc.*, 64 CCPA 51, C.A.D. 1183, 550 F. 2d 662 (1977), logging is an agricultural pursuit and therefore, the merchandise is agricultural implements. In *Jensen* the court had before it certain tractors denominated "Tree Farmer' Skidder Machines", which were utilized to drag logs from the area where the trees were grown to a loading or collection area. The court held the growing of trees and the harvesting of them is an agricultural pursuit, and therefore the tractors involved therein were suitable for agricultural use and, as such, subject to classification under item 692.30, TSUS.

Defendant contends the articles contained in schedule A are part of a class of wire rope fittings which are used in many diverse industries including logging, construction, maritime, mining, oil well rigging, telecommunications and industry in general. In addition, defendant contends even if the wire rope fittings constitute a separate class of articles, plaintiff has failed to prove the chief use of the class. Insofar as use is concerned, General Interpretative Rule 10(e)(i) sets forth the following requirements:

> (e) in the absence of special language or context which otherwise requires—
>
> (i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

It would appear that defendant's admission in its response to the second amended complaint that the merchandise is chiefly used for logging applications renders the question of use moot. This is particularly so since there is substantial evidence of record which supports the question of use. The foregoing coupled with the decision in *Jensen*, which held the harvesting of lumber to be an agricultural use, clearly established the fittings to be chiefly used in agriculture. With this fact in mind it is apparent that the imported fittings are properly subject to classification under item 666.00 since it is obvious that they are "implements". The term implements, as used in the free provisions covering agricultural implements, is given a broad meaning. *Wilbur-Ellis Co.* v. *United States*, 26 CCPA 403, C.A.D. 47 (1939).

In *Wilbur-Ellis* steel bale ties used for baling hay were held to be agricultural implements within the broad meaning of the term, citing

and quoting the following from *United States* v. *S. S. Perry*, 25 CCPA 282, T.D. 49395 (1938):

> The statutory term "agricultural implements" should be given a broad, not a narrow, meaning. *United States* v. *S. S. Perry*, *supra*.
>
> In holding in the *Perry* case, *supra*, that leg bands of celluloid chiefly used for the identification of poultry, were free of duty as agricultural implements under paragraph 1604, *supra*, this court, among other things, said:
>
> > Frequently, "implement" is regarded as being synonymous with a tool or utensil used in manual work. *The term has a broader meaning which we think should be accepted in arriving at the intent of Congress in the enactment of paragraph 1604.* [Italics not quoted.] We quote several definitions of the noun "implement" from Webster's New International Dictionary:
> >
> > *implement.* 1. That which fulfills or supplies a want or use; esp., an instrument, tool, or utensil used by man to accomplish a given work; as, the *implements* of trade, of husbandry, or of war.
> >
> > 2. A constituent part; an element. *Obs.* & *R.*
> >
> > 3. *Scots Law.* Fulfillment, performance.
> >
> > SYN. *implement, tool, utensil, instrument* agree in suggesting relatively simple construction and personal manipulation. *Implement* and *tool* are often interchangeable. But *implement* is the broader term, frequently implying that by which any operation is carried on: *tool* commonly suggests the implements of a craftsman or laborer; * * *
>
> It seems to us that the poultry bands at bar are implements of the poultry raising business when chiefly used for the purpose of identification of poultry. [P. 407.]

After plaintiff had rested counsel for defendant moved, pursuant to Rule 8.3 (c) of the Rules of the Customs Court then in effect, to dismiss the action due to insufficiency of evidence. Defendant further contended the matter should be dismissed with respect to the choker hooks under the theory of *stare decisis*. *See*, *Northwest Machinery Sales Co., et al.* v. *United States*, 66 Cust. Ct. 77, C.D. 4170 (1971). The court after hearing argument denied defendant's motion.

Accordingly, all the fittings set forth in schedule A, except merchandise described as "Guyline Sleeves" which was abandoned by plaintiff, are properly entitled to entry free of duty under item 666.00, *supra*, as claimed. Plaintiff has also abandoned its claim challenging the appraisement of the imported merchandise, and it is, therefore, dismissed.

The balance of the merchandise, i.e. corner bits and repointer tips, will be considered separately from the grouser bars and caps. Defendant has conceded, and plaintiff has agreed to consider "Argument III" of defendant's brief as an amendment of the pleadings to conform to

the evidence. This being consented to the court orders the amendment of the pleadings to include item 664.05, *supra*. The parties have agreed that the corner bits and repointer tips are subject to classification as parts of bulldozers and other machinery described in item 664.05, *supra*, respectively. Accordingly, such merchandise is subject to classification under the provisions of item 664.05, *supra*, and dutiable at 8%, 7%, 6% or 5% ad valorem, depending upon the date of entry.

The grouser bars and caps, designated item Nos. 834–24, 833–22, 852–20, 847–20, 848–22 and 849–24 were conceded by defendant to be entitled to free entry under item 692. 30, *supra*. The court, therefore, holds such items subject to classification as parts of tractors suitable for agricultural use as claimed. The claims as to the remaining grouser caps and bars having been abandoned are dismissed.

Judgment will be entered accordingly.

SCHEDULE A

Standard Ferrule Type Choker Hooks
Ken "2-Way" Choker Hook
Jump-Proof Choker Hooks
Featherweight Choker Hooks
Zinc Choker Ferrules
Spiral Ferrules
Splice-Master Sleeve
Butt Hooks
McGovern Safety Butt Hooks
Double McGovern Safety Butt Hooks
Wedge Type Choker Eye Sockets
Eye Sockets
Hanging Strap Sockets
Swivel Strap Sockets
Swivel Strap Socket Ferrules
Swivel Dees
Mueller "Swivel Shackles"
Butt Rigging or Mainline Shackles
Loading Hooks
Swivel Bull Hooks
Bull Hooks
Arch Hooks
Drawbar Hooks
Jumproof Skidmaster
Rollerbell
Sliding Hook
Mainline Skidder Rings
Guyline Sleeves
Tree Irons
Guyline Extension Hooks
Strawline Hooks
Strawline Swivels
Butt Rigging
Tag Plates
Mainline Butt Rigging
Mainline Butt Slider
Basket Line Hooks
Timberjack Twitchook

SCHEDULE B

Corner Bits
Grouser Caps and Bars
Repointer Tips

(Slip Op. 81–124)

THE MANHATTAN SHIRT COMPANY, PLAINTIFF *v.* UNITED STATES; WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS; DENNIS T. SNYDER, REGIONAL COMMISSIONER OF CUSTOMS (REGION II); ANTHONY M. LIBERTA, AREA DIRECTOR OF CUSTOMS, J.F.K. AIRPORT, JAMAICA, NEW YORK, DEFENDANTS

Court No. 81–12–01609

Decision and Judgment

[Judgment for plaintiff.]

(Decided December 30, 1981)

Rode & Qualey, Attorneys for plaintiff, by *Michael S. O'Rourke* and *Patrick D. Gill*, for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, by *Jerry P. Wiskin*, for the defendants.

FORD, *Judge:* Upon the record and exhibit evidence presented at a hearing on plaintiff's motion for a preliminary injunction in the above-captioned case which was reported as Slip Op. 81–115 and;

Upon the record and exhibit evidence presented at the trial on the merits of this case on December 29, 1981; and

Upon the basis of the annexed findings of fact and conclusions of law; and

Upon all other papers and proceedings had herein, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendants, William von Raab, Commissioner of Customs, Dennis T. Snyder, Regional Commissioner of Customs (Region II), Anthony M. Liberta, Area Director of Customs, J.F.K. Airport, their delegates and any officers or agents subordinate to them are directed to release and allow entry of the merchandise which is the subject of warehouse entry 4701–82–354288–4 covered by protest number 1001–1–013244 and it is further

ORDERED, ADJUDGED, AND DECREED that defendants, William von Raab, Commissioner of Customs, Dennis T. Snyder, Regional Commissioner of Customs (Region II), Anthony M. Liberta, Area Director of Customs, J.F.K. Airport, their delegates and any officers or agents subordinate to them shall not deny entry or withdrawal from warehouse for consumption of John Henry men's fitted dress shirts of man-made fibers, visaed under category 640–D, produced or manufactured in the Republic of Korea by reason of the presence of square shirttails or the fact that the shirts have square bottoms.

FINDINGS OF FACT AND CONCLUSIONS OF LAW TO ACCOMPANY DECISION AND JUDGMENT

Pursuant to an order of the Court dated December 28, 1981, plaintiff herewith submits the following proposed findings of fact and conclusions of law along with a proposed judgment annexed hereto, which the court hereby modifies and adopts.

FINDINGS OF FACT

1. Plaintiff is the importer of record of John Henry men's fitted dress shirts of man-made fibers, manufactured in the Republic of Korea, which were excluded from entry at J.F.K. Airport and which are the subject of this action.

2. Similar John Henry men's fitted dress shirts of man-made fibers, which are being manufactured in the Republic of Korea which plaintiff is importing and will continue to import, are also the subject of this action.

3. Pursuant to section 514 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, plaintiff filed a protest (as delineated on the summons filed with the complaint in this action) which was denied, in whole, pursuant to section 515 of the Tariff Act of 1930, *supra*.

4. John Henry men's fitted dress shirts, have collar sizes stated in specific inches (i.e., 15½) and sleeve lengths in combination (i.e., 32/33) and those sizes appear on a label which is sewn into the center portion of the collar band of each shirt.

5. In addition to collar and sleeve sizes, John Henry men's fitted dress shirts are designed and sized so that each neck size has a corresponding waist measurement.

6. John Henry men's fitted dress shirts have full collar bands which extend to the edges of the front openings of the shirts.

7. John Henry men's fitted dress shirts have fused collars, a characteristic common with fitted dress shirts.

8. John Henry men's fitted dress shirts have square shirttails, characterized by Customs as square bottoms, which are downward extensions of the back and front panels of the shirt, which, in use, are "tucked" into the trousers.

9. John Henry men's fitted dress shirts meet all of the criteria set forth in C.I.E. 36/79, for classification as dress shirts, and, specifically, those set forth on page 30 thereof.

10. In addition to the design characteristics indicated above, John Henry men's fitted dress shirts have the following characteristics:

A. Higher armholes than conventionally cut shirts,

B. Slimmer sleeves than conventionally cut shirts,
C. Tapered body,
D. Lightweight shirtings, self-colored in solid, stripe or check,
E. One breast pocket,
F. A facing less than two inches in width,
G. A placket.

11. The merchandise in question is manufactured by Wonmi Apparel and Textile Ltd., C.P.O. Box 2102, Seoul, Korea, and the contract between plaintiff and the manufacturer describes the merchandise to be manufactured as follows:

> *Men's Dress Shirts, L/S* 2-top fused collar, top center, 1-chest pocket, 2-button adjustable round cuff, straight bottom, double stitching on collar/cuff/top center/sleeve in-seam/side seam, single needle stitching on armhole;

12. Plaintiff's office in Hong Kong, Manhattan Industries (Far East) Ltd., communicated directly to Wonmi Apparel and Textile Ltd. instructions for the manufacture of the merchandise now before the Court and will have a similar function for future entries.

13. Manhattan Industries (Far East) Ltd.'s cutting tickets or purchase orders indicate clearly that the merchandise to be manufactured is "John Henry dress shirt[s]".

14. The numeral "6" appearing in the lot number in each of the cutting tickets is reserved for dress shirts and, in addition, the cutting ticket describes the merchandise as "John Henry European fit" and all collars are "with stay," a dress shirt feature.

15. Plaintiff advertises the merchandise in the United States as a "dress" shirt.

16. John Henry men's fitted dress shirts are marketed and sold in the United States as dress shirts, specifically, fitted dress shirts, and currently fitted dress shirts account for more that 25% of the total department store sales of dress shirts.

17. Department stores in the United States feature John Henry men's fitted dress shirts, and other fitted dress shirts, in separate departments within the stores.

18. Plaintiff, through its John Henry Division, introduced the fitted dress shirt to the U.S. market and has been an innovator in this market since approximately 1973.

19. There is a substantial segment of the retail and consumer market which demands fitted dress shirts such as the John Henry men's fitted dress shirts.

20. The square shirttails on the John Henry men's fitted dress shirts are a design feature of fitted dress shirts.

21. John Henry men's fitted dress shirts are indistinguishable in

appearance from conventionally cut dress shirts with rounded shirttails which are conceded by the Government to be dress shirts.

22. John Henry men's fitted dress shirts are bought, sold, advertised and marketed in the same way as conventional dress shirts; namely, as dress shirts.

23. On October 23, 1981, plaintiff attempted to make entry of the merchandise which is the subject of the protest in this action and which was imported into the United States on October 18 and October 21, 1981.

24. On October 28, plaintiff's attempted entry for consumption was rejected by the Area Director, J.F.K. Airport, Jamaica, New York.

25. Defendants aver that the entry was not rejected because the Customs Service was of the opinion that the John Henry men's fitted dress shirts were other than dress shirts.

26. Defendants aver that the entry was rejected because it had what defendants contend is an "incorrect visa" notwithstanding the fact that the visa was a dress shirt visa (category 640–D).

27. Defendants contend that any dress shirt with a square shirttail, which defendants characterize as square bottom, should be visaed under category 640–O, the visa for other than dress shirts.

28. Defendants contend that even a fitted dress shirt designed for formal wear, a tuxedo shirt, having a square shirttail, should be described as a sport shirt and visaed under category 640–O.

29. On September 29, 1981, the Committee for the Implementation of Textile Agreements ("CITA") caused to be published in the Federal Register (46 FR 47649–50), an "adjustment" of the 1981 import restraint levels for Textile Category 640.

30. As a result of the notice published on September 29, 1981, imports of merchandise in Textile Category 640–O (other than dress shirts) from Korea were embargoed because that category became filled.

31. At the time plaintiff attempted to enter the merchandise, the quota for dress shirts, Category 640–D (dress shirts), was unfilled.

32. The visa accompanying the entry papers submitted by plaintiff included the notation "640–D" not "640–O".

33. On October 8, 1981, CITA caused to be published in the Federal Register (46 FR 49939–40) a notice:

> ACTION: Advising that in order to meet the "correct category" requirement, visas for man-made fiber woven shirts in category 640, produced and manufactured in the Republic of Korea, must be visaed as follows on and after October 13, 1981 (*part only*).
>
> 1. *Category 640–D* (*only T.S.U.S.A. numbers 380.0455, 380.8431 and 380.8433*).

2. *Category 640–O (all T.S.U.S.A. numbers except 380.0455, 380.8431 and 380.8433).*

* * * * * * *

34. The only basis for Customs' action with respect to the classification of the merchandise is the presence on John Henry men's fitted dress shirts of square shirttails which defendants contend are not shirttails and Customs requires rounded shirttails for dress shirt categorization.

35. John Henry men's fitted dress shirts have high armholes for better fit and the square shirttails are designed to prevent the shirt from coming up out of the trousers of the wearer when he makes upward motions with his arms.

36. Items 380.0455, 380.8431 and 380.8422, TSUSA, the statistical classifications for dress shirts, do not contain a requirement that classification of dress shirts is to be determined by the presence or absence of round shirttails.

37. In arriving at its classification determination, defendants relied entirely on their *interpretation* of a description contained in C.I.E. 36/79 that square shirttails are square bottoms, rather than shirttails.

38. C.I.E. 36/79 is neither a statute nor a regulation and does not have the effect of same.

39. C.I.E. 36/79 and the disputed Customs' interpretation thereof are not part of the Bilateral Agreement on Trade in Textiles and Textile Products with the Republic of Korea, 29 U.S.T. 3835 *et seq.*

40. C.I.E. 36/79 contains on requirement that shirttails be rounded, rather than square.

41. C.I.E. 36/79 was published in part, to enhance the "accuracy of the statistical data collected" by Customs.

42. The continued misclassification of John Henry men's fitted dress shirts in item 380.8443 (Category 640–O) rather than item 380.8433 (Category 640–D) will result in the collection of *inaccurate* statistical data.

43. C.I.E. 36/79 by its own terms is advisory and should not be "considered an immutable document," and, as such, defendants must take cognizance of the change in men's shirt design as exemplified by the John Henry men's fitted dress shirts.

44. Plaintiff's John Henry Division of Manhattan Industries, Inc., is one of the largest suppliers in the United States of better, men's fitted dress shirts and its position in the market place will be seriously affected if it is unable to meet its sales commitments to its customers.

45. The John Henry men's fitted dress shirts affected by the embargo (an embargo which will cease on January 1, 1982) were ordered by various retail locations and additional orders will be shipped from Korea to the United States throughout 1982 and thereafter.

46. Plaintiff will suffer substantial money damage if it fails to deliver the shirts.

47. If the Customs Service continues to misclassify John Henry men's fitted dress shirts under Category 640–O in 1982, plaintiff will sustain injury due to lost sales in the amount of $870,000 per month or $29,000 per day.

48. In addition to the specific lost sales caused by the embargo, plaintiff is likely to lose additional sales of other dress shirts both fitted and conventional cut arising from its inability to meet its commitments to the individual retail locations who have ordered the John Henry men's fitted dress shirts.

49. For the past nine years plaintiff has manufactured and advertised the John Henry men's fitted dress shirts as a shirt with a particular fit and, as a result, plaintiff's customers have come to expect certain styling characteristics including square shirttails.

50. The dollar volume of sales of John Henry men's fitted dress shirts has risen substantially from 1978 through projected sales for 1982.

51. Other manufacturers of men's fitted dress shirts, both domestic and foreign, produce their shirts with square shirttails; therefore, if plaintiff were to change its design, specifically change the cut or shape of the square shirttail, it would run the risk of losing its customers to other manufacturers.

52. Because of the embargo placed on the merchandise in question, plaintiff is unable to obtain replacement goods from any other source, either domestic or foreign.

53. Currently, Korea accounts for approximately 23% of all imports of John Henry men's fitted dress shirts and that production from other sources such as Taiwan or Hong Kong are at maximum levels, therefore, a shift to these resources would be extremely difficult, if not impossible.

54. If a shift of a supply from Korea to Taiwan or Hong Kong were possible, it would result in substantial additional costs to the American consumer because of the increased costs to plaintiff which would occur as a result of manufacturing in Hong Kong or Taiwan.

55. Plaintiff has expended a substantial amount of time and capital developing Wonmi Apparel and Textile Ltd. as a source in Korea, and that the loss of this facility as a source of supply will have a substantial impact on plaintiff's ability to have available similar men's fitted dress shirts for sale in the U.S. market in 1982.

56. On or after October 13, 1981, and for the foreseeable future, importations of category 640 merchandise from Korea will require a visa which agrees with Customs' classification of the merchandise imported (i.e., 640–D merchandise classifiable under item 308.8433).

57. Plaintiff's source of production in Korea does not hold "640–O" quota for the export of John Henry men's fitted dress shirts, therefore, plaintiff will be unable to obtain "640–O" visas for its "640–D" merchandise currently embargoed or "640–D" merchandise shipped in the future.

58. The requirement to designate category 640 merchandise with a "D" or "O" coupled with Customs' misclassification of plaintiff's merchandise will preclude plaintiff from entering the John Henry men's fitted dress shirts now embargoed and this situation will continue for the foreseeable future.

59. The John Henry men's fitted dress shirt division of plaintiff is the principal profit maker of plaintiff and at times has been the only profitable division of plaintiff.

60. Any interruption in deliveries as a result of a Customs' refusal to release John Henry men's fitted dress shirts would have a devastating impact on plaintiff and would cause irreparable injury to plaintiff.

61. Among other things, a detention of John Henry men's fitted dress shirts by Customs would likely lead to cancellations, now and for the future, of orders by plaintiff's principal buye s.

62. Plaintiff's credibility in the market place as a reliable source for fitted dress shirts will be lost and its reputation ruined.

63. John Henry men's fitted dress shirts are seasonal articles of apparel which must be imported and delivered on a timely basis in accordance with fixed delivery schedules.

64. If plaintiff's delivery schedules for the coming seasons of 1982 are disrupted as a result of a Customs' refusal to release the shirts accompanied by visas under category 640–D, plaintiff may be forced to go out of business.

65. Plaintiff's anticipated shipments from Korea for 1982 are essential to its continued growth and profitab lity.

66. On December 18, 1981, CITA caused to be published in the *Federal Register* (46 *Fed. Reg.* 61692–93) a notice announcing new control levels for category 640–D and category 640–O for 1982, and as a result, there will be no embargo on either category as of January 1, 1982, and for the foreseeable future.

67. Defendants will still preclude entry of John Henry men's fitted dress shirts imported from Korea, not because the merchandise is embargoed but only because the merchandise is accompanied by visas under category 640–D rather than category 640–O.

68. The impact of permitting or denying entry to plaintiff's John Henry men's fitted dress shirts will be felt by plaintiff alone and will have no impact on defendants by reason of the fact that there will

be no embargo on either category 640–D or 640–O from Korea as of January 1, 1982.

69. The release of plaintiff's John Henry men's fitted dress shirts imported from Korea and accompanied by visas under category 640–D will have no impact or result in no harm to defendants even if an appeal is taken by defendants.

Conclusions of Law

1. The Court has jurisdiction and the power to grant the relief sought by plaintiff pursuant to 28 U.S.C. 1581(a), 28 U.S.C. 1581(h), 28 U.S.C. 1581(i)(3)(4), and 28 U.S.C. 1585.

2. Plaintiff has standing to bring this action pursuant to 28 U.S.C. 2631(a), 28 U.S.C. 2631(h), and 21 U.S.C. 2631(i).

3. John Henry men's fitted dress shirts are within the common meaning of the term, dress shirts.

4. Defendants have not introduced a scintilla of evidence that John Henry men's fitted dress shirts are commercially or commonly understood to be other than dress shirts and concede in answer to paragraphs 22 and 23 of the complaint that they are dress shirts.

5. The decision to exclude John Henry men's fitted dress shirts from entry when imported from Korea and accompanied by a visa under category 640–D is devoid of any rational basis in fact or law.

6. The continued exclusion of John Henry men's fitted dress shirts from Korea when accompanied by visas under category 640–D will result in harm to plaintiff.

7. John Henry men's fitted dress shirts are properly classifiable as "other men's or boys' wearing apparel, not ornamented: of man-made fibers: Not knit: Other: Shirt: Dress: Other," in item 380.8433, Tariff Schedules of the United States Annotated, as amended by the Trade Agreements Act of 1979 (1981).[1]

8. Dress shirts imported from Korea classifiable under item 380.8433, TSUSA, must be accompanied by a visa under category 640–D as is manifest from Finding of Fact 33.

9. John Henry men's fitted dress shirts imported from Korea are entitled to entry when accompanied by a visa under category 640–D.

10. Customs improperly excluded from entry for consumption the merchandise which is the subject of entry number 4701–82–354288–4 and said merchandise should be released immediately.

11. Defendants may not deny entry or withdraw from warehouse for consumption of John Henry men's fitted dress shirts of man-made fibers, visaed under category 640–D, produced or manufactured in the Republic of Korea, by reason of the presence of square shirttails.

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[1] This provision will become item 397.9540, TSUSA, in 1982.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DEPARTMENT OF THE TREASURY, *January 4, 1982.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/493	Watson, J. December 28, 1981	Compass Instrument & Optical Co., Inc.	273725-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/494	Watson, J. December 28, 1981	Compass Instrument & Optical Co., Inc.	274690-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars and field glasses
R81/495	Re, C.J. December 29, 1981	C. J. Tower and Sons of Buffalo, Inc.	R69/485	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is value found by appraising official as reflected on invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo Studebaker automobiles and optional equipment

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R81/496	Re, C.J. December 29, 1981	C. J. Tower and Sons of Buffalo, Inc.	R69/488	Cost of production	As set forth in decision and judgment in column designated "Total Cost of Production of Basic Automobiles" at amounts in Canadian currency, including value of U.S. components as appraised; value of optional equipment on each automobile in Canadian currency is value found by appraising official as reflected on invoices	U.S. v. C. J. Tower & Sons of Buffalo, Inc. (C.A.D. 1079)	Buffalo Studebaker automobiles and optional equipment
R91/497	Watson, J. December 29, 1981	Compass Instrument & Optical Co., Inc.	277538-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/498	Watson, J. December 29, 1981	Compass Instrument & Optical Co., Inc.	277543-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

R81/499	Watson, J. December 29, 1981	Compass Instrument & Optical Co., Inc.	279455-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/500	Watson, J. December 29, 1981	Compass Instrument & Optical Co., Inc.	295801-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/501	Watson, J. December 29, 1981	Compass Instrument & Optical Co., Inc.	296388-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R81/502	Watson, J. December 29, 1981	Compass Instrument & Optical Co., Inc.	R58/4191, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars

Motion for Rehearing and Modification

DECEMBER 29, 1981

CONNORS STEEL COMPANY *v.* UNITED STATES, COURT NO. 80–3–00478. —CROSS-MOTIONS FOR REVIEW OF ADMINISTRATIVE RECORD.— Slip Op. 81–110. Motion by defendant for a rehearing and modification of that part of decision which held that Secretary of Treasury did not act in accordance with law and remanded the matter to the Secretary of Commerce.

126

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY, *January 14, 1982*

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

WILLIAM VON RAAB,
Commissioner of Customs.

Investigation No. 701-TA-80 (Final)

Notice of Termination of Countervailing Duty Investigation Concerning Lamb Meat From New Zealand

AGENCY: United States International Trade Commission.

ACTION: Termination of countervailing duty investigation under section 704(a) of the Trade Agreements Act of 1979, with regard to lamb meat from New Zealand.

EFFECTIVE DATE: January 4, 1982.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen Miller, Office of Investigations, telephone number (202) 523-0305.

SUPPLEMENTARY INFORMATION:

On April 23, 1981, a petition was filed with the Department of Commerce by counsel for the National Wool Growers Association, Inc., Salt Lake City, Utah, alleging that imports of lamb meat from New Zealand are being subsidized within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303). The National Lamb Feeders Association, Inc., Menard, Texas, became a copetitioner on May 12, 1981. As New Zealand was not at that time a "country under the Agreement" within the meaning of section 701(b) of the Act (19 U.S.C. 1671(b)), there was no requirement for the petition to be filed with the Commission pursuant to section 702(b)(2) (19 U.S.C. 1671a(b)(2)) and no requirement for the Commission to conduct a preliminary

material injury investigation pursuant to section 703(a) (19 U.S.C. 1671b(a)).

On September 17, 1981, however, the United States Trade Representative announced that New Zealand had become a "country under the Agreement" (46 FR 46263). Accordingly, Commerce terminated its investigation under section 303, initiated an investigation under section 702, and notified the Commission of its action on September 21, 1981.

Therefore, effective September 21, 1981, the Commission, pursuant to section 703(a) of the Act (19 U.S.C. 16711(a)), instituted preliminary countervailing duty investigation No. 701–TA–80 (Preliminary). On November 8, 1981, the Commission determined by a 4–2 vote that there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, by reason of imports from New Zealand of lamb meat, provided for in item 106.30 of the Tariff Schedules of the United States (TSUS), upon which bounties or grants are alleged to be paid.

The Department of Commerce published in the Federal Register of November 30, 1981 (46 FR 58128) its preliminary affirmative countervailing duty determination, estimating a net subsidy of 6.19 percent of the f.o.b. value of lamb meat exports to the United States. Accordingly, effective November 30, 1981, the Commission instituted investigation No. 701–TA–80 (Final) under section 705(b) of the Act to determine whether an industry in the United States is materially injured, or is threatened with material injury or the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination.

On December 23, 1981, the Commission was notified by letter that the National Wool Growers Association, Inc., and the National Lamb Feeders Association, Inc. withdrew their petition which prompted the countervailing duty investigation concerning lamb meat from New Zealand. No reason was given in the letter for their withdrawal.

Since the National Wool Growers Association and the National Lamb Feeders Association were the sole petitioners and since these two organizations were the sole participants in the public hearing held in connection with the Commission's preliminary investigation on the subject, the Commission is terminating its investigation on lamb meat from New Zealand, Inv. No. 701–TA–80 (Final), pursuant to section 704(a) of the Trade Agreements Act of 1979.

By order of the Commission.

Issued: January 5, 1982.

KENNETH R. MASON,
Secretary.

Notice of Investigation and Hearing

(TA–203–13)

CERTAIN MUSHROOMS

AGENCY: United States International Trade Commission.

ACTION: Following receipt of a request from the U.S Trade Representative on December 21, 1981, the Commission instituted investigation No. TA–203–13 under section 203 (i)(1) and (i)(2) of the Trade Act of 1974 (19 U.S.C. 2253 (i)(1) and (i)(2)) for the purpose of gathering information in order that it might advise the President (1) on developments in the mushroom industry since import relief became effective, including the progress and specific efforts made by the firms in the industry to adjust to import competition, and (2) of its judgment as to the probable economic effect on the domestic industry concerned of the reduction or termination of the import relief presently in effect with respect to canned and frozen mushrooms broiled in butter or in butter sauce, provided for in item 144.20 of the Tariff Schedules of the United States (TSUS). Such import relief is in the form of increased rates of duty and is provided for in Presidential Proclamation 4801 of October 29, 1980 (45 FR 72617); the relief is described in item 922.55 of the Appendix to the TSUS.

EFFECTIVE DATE: December 29, 1981.

FOR FURTHER INFORMATION CONTACT: Tim McCarty (202–724–1753).

SUPPLEMENTARY INFORMATION:

Public hearing ordered. A public hearing in connection with this investigation will be held in Washington, D.C., at 10 a.m., Wednesday, March 10, 1982, in the Hearing Room, U.S. International Trade Commission Building, 701 E Street NW. Requests for appearances at the hearing should be received in writing by the Secretary to the Commission at his office in Washington, no later than the close of business Monday, February 8, 1982.

Prehearing procedures. To facilitate the hearing process, it is requested that persons wishing to appear at the hearing submit prehearing briefs enumerating and discussing the issues which they wish to raise at the hearing. An original and nineteen copies of such prehearing briefs should be submitted to the Secretary to the Commission no later than the close of business Wednesday, March 1, 1982. Copies of any prehearing briefs submitted will be made available for public inspection in the Office of the Secretary. While submission of prehearing briefs does not prohibit submission of prepared statements in accordance with section 201.12(d) of the Commission's *Rules of Practice and Procedure* (19 CFR 201.12(d)), it would be unnecessary to

submit such a statement if a prehearing brief is submitted instead. Oral presentations should, to the extent possible, be limited to issues raised in the prehearing briefs.

A prehearing conference will be held on Wednesday, February 10, 1982, at 10:00 a.m., in Room 117 of the U.S. International Trade Commission Building.

Persons not represented by counsel or public officials who have relevant information to present may give test mony without regard to the suggested prehearing procedures outlined above.

By order of the Commission.

Issued: December 29, 1981.

KENNETH R. MASON,
Secretary.

In the Matter of
CERTAIN CUBE PUZZLES } Investigation No. 337–TA–112

Order

Pursuant to my authority as Chief Administrative Law Judge of this Commission, I hereby designate Administrative Law Judge Janet D. Saxon as Presiding Officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Issued: December 29, 1981.

DONALD K. DUVALL,
Chief Administrative Law Judge.

In the Matter of
CERTAIN LOG SPLITTING PIVOTED LEVER AXES } Investigation No. 337–TA–113

Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 27, 1981, under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), on behalf of Chopper Industries, Inc., 81 Stockton Street, Phillipsburg, N.J. 08865. A supplement to the complaint was filed on December 11, 1981.

The complaint, as supplemented, (hereinafter the complaint) alleges unfair methods of competition and unfair acts in the importation of certain log splitting pivoted lever axes into the United States, and in their sale, by reason of the alleged (1) direct infringement of claims 1–6 and 8–14 of U.S. Letters Patent 4,044,808 and (2) contributory infringement of claims 12 and 14 of said patent. The complaint further alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The complainant requests the Commission to institute an investigation and, after a full investigation, to issue both a permanent exclusion order and a permanent cease and desist order.

AUTHORITY: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930 and in section 210.12 of the Commission's Rules of Practice and Procedure.

SCOPE OF INVESTIGATION: Having considered the complaint, the U.S. International Trade Commission, on December 22, 1981, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, an investigation be instituted to determine whether there is a violation of subsection (a) of section 337 in the unauthorized importation of certain log splitting pivoted lever axes into the United States, or in their sale, by reason of the alleged (1) direct infringement of claims 1–6 and 8–14 of U.S. Letters Patent 4,044,808 and (2) contributory infringement of claims 12 and 14 of said patent, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States;

(2) For the purpose of this investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—Chopper Industries, Inc., 81 Stockton St., Phillipsburg, N.J. 08865.

(b) The respondents are the following companies, alleged to be in violation of section 337, and are the parties upon which the complaint is to be served: Taiwan Tool Co., a/k/a Taiwan Tools Corp., 177 Wenhwa Rd., Hsi Tun District, Taichung, Taiwan, Alltrade, Inc., 1717 Gage Road, Montebello, Calif. 90640.

(c) Samuel Bailey, Jr., Unfair Import Investigations Division, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall be the Commission Investigative Attorney, a party to this investigation; and

(3) For the investigation so instituted, Donald K. Duvall, Chief Administrative Law Judge, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall designate the presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the presiding officer and the Commission, without futher notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination containing such findings.

The complaint, except for any confidential information contained therein, is available for inspection during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202–523–0161.

FOR FURTHER INFORMATION CONTACT: Samuel Bailey, Jr., Unfair Import Investigations Division, U.S. International Trade Commission, telephone 202–523–1273.

By order of the Commission.

Issued: December 31, 1981.

KENNETH R. MASON,
Secretary.

U.S. GOVERNMENT PRINTING OFFICE : 1982 O - 359-831

Index

U.S. Customs Service

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

OFFICIAL BUSINESS
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